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Aug/Sept 1995

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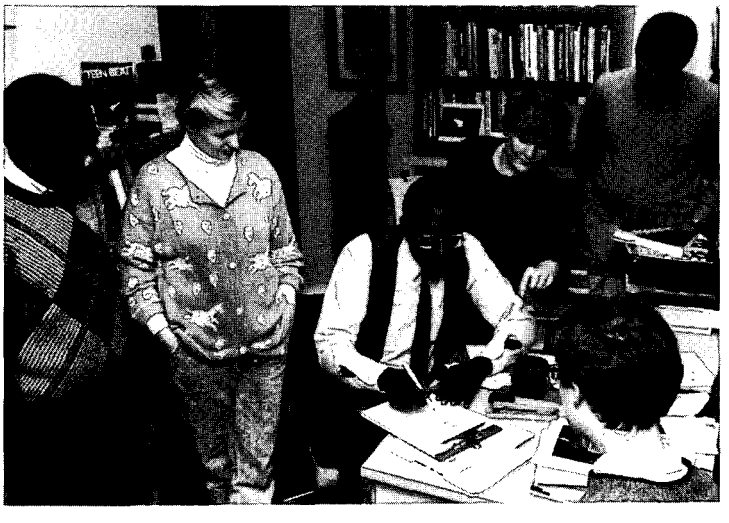

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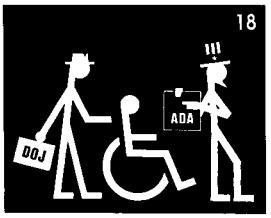

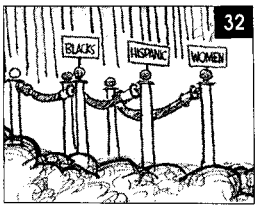

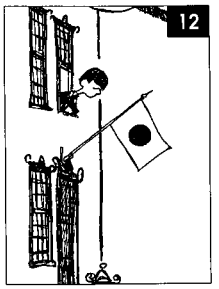

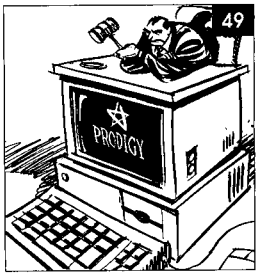

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The Lethal Center

By Virginia I. Postrel

The danger of quick-fix consensus

IN 1949, A 32-YEAR-OLD CHILD OF THE New Deal wrote a book that sought to establish the limits of respectable political thought—of consensus and common sense—in the conformist post–World War II era. Positioning himself between the "Doughface progressives" who believed in the perfectibility of man and the "plutocratic reactionaries" who supported free markets, Arthur Schlesinger Jr. defined his own position in his book's title: *The Vital Center*. Summing up the spirit of his age, he wrote, "During most of my political consciousness this has been a New Deal country. I expect it will continue to be a New Deal country."

These days, Schlesinger is not a happy camper. His New Deal country is history, its constituents the denizens of nursing homes and Florida retirement communities. He rants in *The Wall Street Journal* that "Getting government off the back of business really means putting business on the back of government" and, "A contest in meanness will not enhance the quality of American civilization." Nobody listens or cares.

But a Schlesingerian center lives on in American politics, a Lethal Center that jumps at new ideas to expand government power in the name of "common sense." Like the Vital Center, the Lethal Center seeks to limit respectable opinion through ridicule and ostracism. It, too, is bipartisan, the coming together of "pragmatic" liberals and "responsible" conservatives. It, too, trusts the competence and good faith of government officials and, conversely, doubts that of private citizens.

Above all, it is simplistic. Like Schlesinger's New Deal pragmatism, it offers a Mr. Fix-It approach that promises quick, easy relief for difficult problems. It detests the messy, unpredictable, and open-ended evolution of social and economic institutions in a free society. It promises to short-circuit those complex processes and deliver a cleaned-up world. And, because the Lethal Center frames its positions in terms of common sense, it enjoys wide public support. Lethal Center issues produce lopsided votes in Congress and equally lopsided poll results.

The Lethal Center is not mere statism. It is a particular form of dumbed-down discourse that treats with contempt any suggestion that its "obvious" prescriptions might not be a good idea. It declares that "of course" violence in society is caused by TV cop shows, or gangsta rap, or Schwarzenegger movies, or too many guns. It believes that banning these offending products is the common-sense way to reduce violence—and that such bans will be simple and low-cost to enforce. The Lethal Center knows that illegal immigrants, flag burning, and pot-smoking college students pose a threat to the very fabric of American society and that prison time, hefty fines, and more police powers can save us. The Lethal Center is certain that if we "get tough" with the Japanese, perhaps by sticking 100 percent taxes on luxury cars, trade barriers will fall and Americans will prosper.

The Lethal Center holds that politicians are controlled by "special interests" that keep government from "getting things done." It is forever in pursuit of "meaningful campaign reform" and restrictions on lobbying. The Lethal Center is responsible for feel-good legislation, from the Americans with Disabilities Act to the recently passed Senate bill banning sexual speech via electronic networks. The Lethal Center believes that "of course" every restaurant should have wheelchair ramps and no computer jock should send racy e-mail, even to his wife. Such ideas are "common sense." They move, as Mario Cuomo put it in a recent speech, "away from ideological claptrap and toward progressive pragmatism."

LETHAL CENTRISTS LIKE TO PROCLAIM their pragmatism. But more often than not their search for simplistic answers leads them into cloud cuckoo land. The queen of the Lethal Center, for instance, is undoubtedly California Sen. Dianne Feinstein. Her solution to every problem seems to be a ban. She recently introduced a blatantly unconstitutional bill to outlaw Internet publication of information on making bombs, and her harebrained remarks to *60 Minutes* about confiscating guns sent waves of fear through the gun-rights community.

But her wackiest idea has nothing to do with guns or bombs. Feinstein has decided to get tough on illegal immigrants—about 1 percent of the U.S. population—by forcing every American who wants to work to be registered in a federal database and to obtain an identification card. Every employer would have to tie into federal computers to verify that the card is legitimate and the worker is legal. The costs of the registry, in cash as well as privacy, are enormous.

"Whether the card carries a magnetic strip on which the bearer's unique voice, retina pattern, or fingerprint is digitally encoded," Feinstein writes in *Roll Call*, "or whether it incorporates a digitized photo and signature integrated into the plastic card itself, it is clear to me that state-of-the-art work and benefits eligibility IDs can and must replace the Dinosaur Age documents being used." There you have it: progressive pragmatism in its finest high-tech form, the Lethal Center at work. The government, and the accuracy of its computer records, gets to control

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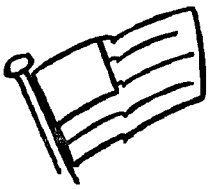

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everyone's livelihood because "of course" we have to do something—anything—to stop illegal immigration. And "of course" working in America is a privilege, not a right, even for native-born citizens.

The Lethal Center was center stage during the Clinton-Gingrich love-in in New Hampshire, as the two men pandered to a New Deal audience yearning for old-fashioned bipartisan support for activist government. With such convivial appearances, said a questioner, "you may help turn our country around and get rid of this backbiting which has prevented our country from going ahead during the past 10 years." He continued with a ringing endorsement of the United Nations.

Across America, broadcasts and newspapers showed the happy handshake, as Bill Clinton and Newt Gingrich enthusiastically agreed to a commission on campaign and lobbying reform. Such "reform" efforts have always served to entrench incumbents, stifle free speech, and make running for office a rich man's privilege; these results have sometimes been the unintended consequences of simple-minded laws and sometimes the very intended consequences of devious lawmakers. But cracking down on lobbying and campaign contributions always appeals to the Lethal Center, including the questioner who proposed the commission because he blamed special interests for the fall of ClintonCare. And on that happy day in June, the photo op was more important than debating the merits of either taxpayer-financed campaigns or government-controlled health care.

Clinton and Gingrich also went out of their way to praise Barbara Jordan and her commission on immigration, which recently proposed a 30 percent cut in *legal* immigration, accompanied by hefty new taxes on businesses that hire legal immigrants and more central planning of which jobs are good enough to justify allowing people in to fill them. That cutting immigration, like raising the minimum wage, would benefit the poor is a Lethal Center truism invoked by Clinton and only tepidly disputed by Gingrich.

The Lethal Center is worrisome because it is popular and populist. Gingrich knows he likes legal immigrants; they're constantly coming up to him, invoking the American dream, and praising his vision of an opportunity society. He knows better than to commend the Jordan commission and yammer on about how illegal immigrants are taking away chicken processing jobs (possibly the worst jobs in America) from the people of north Georgia. But the Lethal Center is hard to resist.

Its only antidote is the Counter Center, which has a different notion of common sense. These are the people who know that *of course* violence isn't caused by television or song lyrics but by moral choices; that *of course* flag burning is a trivial issue and flag-protection statutes tantamount to idolatry; that *of course* huge new taxes on hiring Indian engineers or buying Japanese luxury cars will not make Americans richer or more competitive; that *of course* campaign finance reforms proposed and passed by incumbents will entrench them in office; that *of course* owning weapons for personal protection is a natural right; that *of course* political officials should vigorously debate their philosophical differences instead of playing kissy face; that *of course* Americans are best served by truth telling about the limits of government competence and the costs of government power.

The Counter Center isn't libertarian, but it is skeptical—of both easy-sounding "solutions" and posturing politicians. Its opponents in the hegemonic Lethal Center slam as "cynical" or "ideological" anyone who dares question their conventional wisdom, but the Counter Center is in fact less simplistic and more pragmatic than the Lethal Center. And it is just as real. Both impulses, both definitions of "common sense," exist in the hearts and minds of most not-especially-political Americans.

The trick is to cut through the pieties of the Lethal Center long enough to remind people of how silly, or threatening, those pieties become when politicians translate them into law. The peer pressure that enforced Schlesinger's Vital Center

could withstand neither determined nonconformists nor the lessons of experience. The Lethal Center is just as unrealistic, and just as vulnerable. But to be defeated, it must be resisted. We will be better off if its defeat comes at the hands of loudmouthed truth tellers than if we have to, once again, learn from our foolishness.

Monopoly Games

By Brian Doherty

Who's got the market power?

WE HAVE HEARD MUCH TALK about the dangers of too much "market power" lately, in industries from communications media to computer software. The government's decades of antitrust enforcement are built on fear of the dangers of too much concentrated power in the hands of individual businesses. This fear is little analyzed; the weight of government antitrust policy is supported by a tissue of historical myths about the ability of rapacious companies to drive competitors out of business predatorially and then reap monopoly profits and undue market power.

But monopoly profits exist over the long run only when the government guarantees them, as in utilities and cable. And for concentration of market power, no robber baron can hold a candle to the U.S. government.

A recent example of this arose from presidential candidate Robert Dole's assault on the corrosive moral character of popular entertainment. It was much noted, but will doubtless not be long remembered—just another contentless tempest in a teapot, with an insincere politician making toothless pronouncements on an issue about which none of his opponents disagree and about which he has neither the intention nor the ability to do anything. The press dutifully makes a fuss. (Remember the drug issue in 1988?)

But Dole's snipings caused rumors in Hollywood that Time Warner, the entertainment megaconglomerate that sells much of the music, movies, and television that the Doles of the world never experience but still hate and fear, is thinking about selling off its entire music division, even though it's a profit-maker for the debt-ridden company.

The rumored reason? They have a lot riding on possible telecommunications deregulation bills this year, bills that Dole will be influential in shaping, and they don't want to offend him.

Time Warner might be contemplating the sale for reasons other than a fear of Dole—the need for a quick cash infusion to retire some of their debt, perhaps—but the incident is still a naked reminder of something that Department of Justice antitrust mavens ignore: The hugest concentration of market power in this country does not lie with the likes of Rupert Murdoch or Bill Gates, but with the government itself.

THE GOVERNMENT HAS RECENTLY CAUSED sharp drops in Philip Morris's stock by making threatening noises about regulating nicotine. It has caused newsprint shortages—which were instrumental in driving the *Houston Post* out of business this year—through recycling mandates. The fortunes of biotech, pharmaceutical, and device manufacturers rise and fall with changes or anticipated changes in regulatory policy.

Stock market averages fluctuate in response to presidential pronouncements and election results. The price of dollars in the world market is always subject to government manipulation. Government farm and trade policies raise the price of food and any imported merchandise. And if the government suspects your business has strategic importance for whatever reason, your venture capital problems are probably over.

No private company, no matter how huge or wealthy, could possibly have as much widespread power over the functioning of American markets as government does. And this power is exercised with essential unseriousness. When Time Warner expressed fear that its cable business might be subject to government chicanery because they market music that the powerful find offensive, a Dole spokesman rushed to assure them that Dole's expressed feelings about the one would have no effect on the other.

This was meant to convey that Dole was a fair man. More accurately, it conveyed that Dole placed no weight whatever on his pronouncements about the entertainment industry. They were merely that week's gambit for press attention. It worked, and now Dole will move on to other business. These people pay no mind to the secondary and tertiary ill effects of what they say or do on markets. At least a business can be expected to make most of its decisions for a predictable reason: profit for its stockholders. Politicians act for reasons that can be wild, whimsical, ignorant, and unpredictable.

And unlike business attempts to make money, which necessarily involve selling something to a willing consumer, government's market manipulations require forcing people into situations—whether paying more for cars or food, paying for R&D on new technologies, or selling off a part of their company—that they would not have wanted to be in but for the government's ham-handed threat of force.

Instead of scouring the marketplace for bullies to cow with antitrust law, Uncle Sam must restrain himself. Nothing could serve the workings of the marketplace better than his leaving it.

■ We're delighted to announce that Jacob Sullum has rejoined REASON's staff, as a senior editor based in New York City.

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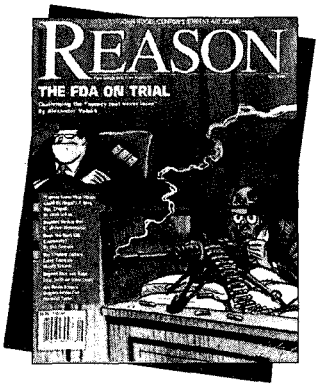

Food und Drang Administration

As one who has objected to a number of FDA actions, I approve of much of Alexander Volokh's article ("Clinical Trials," May). I have little love for the FDA.

But I have less for drug manufacturers who, with the FDA's connivance, claim exclusive rights to products developed with our money and charge exorbitant prices for some when their own R&D has been recovered a hundredfold. In seeking to reduce regulations, I should not want us to throw the baby out with the bathwater.

I remember why federal regulation was needed in the first place. When I took high school chemistry, our professor had a glassed-in cabinet of tainted, corrupted, even poisonous canned products sold as food before federal regulation came in earnest with the passage of the Pure Food and Drug Act of 1906. (It was only in 1931 that the FDA itself was created.)

Throughout recorded history there have had to be laws regulating food (especially adulteration) and drugs; we cannot do away entirely with them now.

Ralph Mason Dreger, Ph.D.
Baton Rouge, LA

Many libertarian authors become con-fused between good guys and bad guys. Just because government is bad, it does not follow that industry is good. The Bureau of Health Statistics notes that 125,000 people died in 1992 from adverse reactions to prescribed drugs. Alexander Volokh's "statistical" claim of all the lives that could have been "saved" if the FDA had permitted the marketing of various drugs and devices does not ring true. I suppose what he means by a "life saved" is a few more months of suffering at the cost of hundreds of thousands of dollars to insurance customers.

I dislike the FDA as much as anyone, but please don't assume that the pharmaceutical industry (or any other industry for that matter) is an altruistic institution. Let the buyer beware.

Gordon LaBedz, M.D.
Los Angeles, CA

Alexander Volokh's article presents hard evidence that the FDA causes the deaths of thousands of Americans every year by holding up the approval of lifesaving medical drugs and devices. The article is an excellent indictment of the FDA, but it doesn't go far enough.

The book *Drugs Available Abroad* by Jerry L. Schlesser (Gale Research Inc., Detroit, 1991) lists more than 5,000 safe and effective drugs available in countries around the world, but not in the United States. Many of these drugs, such as the neurostimulators Centrophenoxine and Piracetam, have been used safely and successfully throughout the world for decades, but will never be approved in the United States because the companies selling them have no incentive to seek approval. The patents on such drugs have long since expired and their widespread use makes them poor candidates for the huge expenditure of money and time needed to apply for FDA approval. The Center for the Study of Drug Development at Tufts University in Boston has calculated that it costs a company an average of $230 million and 10 years to obtain FDA approval for a new drug. These kinds of costs make it impossible for all but the largest pharmaceutical companies to get FDA approval for new drugs.

The agency's discouragement of off-label uses of approved drugs (such as aspirin) also causes many deaths. Although doctors are free to use approved drugs for any use they think appropriate, companies cannot advertise these uses, and most doctors are hesitant to prescribe off-label uses because of their lack of knowledge about these uses and because of their fear of malpractice suits. And, while the FDA has a policy that Americans may import unapproved drugs from foreign countries for their personal use, the agency does everything in its power to prevent them from doing so. The FDA orders U.S. Customs to seize such products at our borders and tries to destroy companies in other countries that sell unapproved drugs to Americans.

The agency is also responsible for deaths from highly dangerous drugs approved by the FDA. Thomas J. Moore's recent book *Deadly Medicine* (Simon and Schuster, 1995) documents the needless deaths of hundreds of thousands of Americans from the use of a single class of antiarrhythmic drugs. Moore shows that the FDA approved these drugs without a shred of evidence that they provide benefits for anyone and with hard evidence that they kill people. The FDA knew that these drugs were killing people by causing the very same arrhythmias they were supposed to prevent, but the agency approved them anyway on the theory that they might save more lives than they cost. This theory was obliterated by a controlled clinical trial directed by the National Heart, Lung, and Blood Institute, which found that patients taking the drugs died at least three times as frequently as patients on placebos.

Finally, the agency has caused enormous damage to the health of the American people through its policies regarding vitamins, minerals, and other nutrient sup-

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plements. Although there have been thousands of studies showing that nutrient supplements can help to prevent heart attacks, strokes, cancer, and other lethal diseases, the FDA prohibits companies selling these products from informing the public about these studies.

There is a simple solution to stop the carnage, initially proposed by Durk Pearson and Sandy Shaw: Just take away the FDA's power to stop Americans from using the products they wish to use by providing for a split label (including promotional literature). Half the label would be written by the company selling the product and half by the FDA. Anyone who wants FDA protection could stay away from unapproved products, while those who want freedom of choice could waive FDA protection whenever they wish to.

Such a change would force the FDA to compete for the consumer's ear. If the FDA gave consumers good advice based upon solid research, most health-conscious Americans would follow it; if the FDA's advice was bad and unsupported by evidence, most health-conscious Americans would ignore it.

Saul Kent
President
Life Extension Foundation
Ft. Lauderdale, FL

The obvious question that the average citizen usually faces is, "When is my life-saving product going to be approved?" However, a far larger foundational issue Mr. Volokh touched on merits a different discussion here.

The more paramount question is whether there will be any small medical manufacturing companies left in business by the end of the decade that will be in a position to manufacture these life-saving devices. The monolithic billion-dollar conglomerate medical manufacturers with the means and manpower will simply shuffle money, people, and plants across international borders at a faster and faster rate. Most of the rest of the medical manufacturing industry will likely be stuck in the United States, struggling to survive. The firms that are too small or too financially strapped will suffer and be eaten alive (i.e. acquired) by the multinational firms. Likewise for firms that may be too cautious—a very preventable but unfortunate trait of most American corporate managers today.

In the not-too-distant future, firms that require large masses of research will regularly conduct it in China, India, Korea, and other developing countries. These are countries with well-educated researchers and scientists who can conduct basic research at fractions of the prices in the United States.

Some of this may sound like overstatement and oversimplification, since there will almost certainly always be medical manufacturing companies in the United States. The total number of U.S. medical manufacturers has tripled since 1980, according to FDA statistics. Having reported on the medical industry since 1980, though, I can readily testify that the trend toward more companies is in critical danger of reversing at the same rate.

Another eye-opening experience is to read the list of products being exported overseas. Every month, several dozen are approved by the FDA for export, even though they have not been cleared by the FDA for sale in the United States. This totals many hundreds of products per year that are not available to U.S. medical practitioners and their desperate (but usually unaware) patients.

It is also worth noting that at least 95 percent of these products will at some point receive FDA "clearance," according to FDA officials and outside legal counsel, since they have to meet FDA requirements in order to be OK'd for export. Because of that level of certainty, *Biomedical Market Newsletter* now trumpets that it can predict which products the FDA will approve, months or even years beforehand. It is an embarrassingly simple but extremely accurate crystal ball that is only possible because the bureaucrats are so predictable.

However, to lay the blame for all of these incidents and others solely at the feet of the FDA, and claim that virtually all the troubles of U.S. medical manufacturers would disappear if the FDA were eliminated is not true. The FDA product-approval process is faster than it was two years ago and additional improvements were announced in recent weeks. It is a mistake to swallow the logic of those who claim the FDA can and should be replaced.

It cannot, and should not, be replaced. Improved? Absolutely. This year? A must. Will it happen? A safe bet. Make a difference? For sure. Save U.S. jobs? No question. Worth trying? Our future depends on it.

David G. Anast
Publisher/Editor
Biomedical Market Newsletter
Costa Mesa, CA

While we agree with the thesis presented in Alexander Volokh's article, we consider the statistics used at the beginning of the article to be misleading at best.

The numbers provided are baseless within the context of the article. Without any sources accompanying them, they are no better than the endless litany of "scare" statistics for such things as the now-infamous Super Bowl domestic violence statistics. Even if the withheld products were available to those people cited in the "statistics," there is no evidence presented that all of the deceased people (or even a large percentage of them) would actually have benefited from those products.

It would have been better to focus the article on the simple fact that the FDA disallows our citizens and their selected health care providers freedom of choice in determining what's best for their individual health care needs. This simple fact is what can lead to preventing many tragic and preventable deaths. Numbers aren't important.

We also feel that for the purposes of the article, it would have been much more illustrative to focus on examples in which the FDA approved/licensed drugs or devices, and yet problems resulted anyway, showing that the FDA really doesn't make much of a difference, safety-wise, with its present level of excessive regulatory intrusion. One example would be the drug

Felbamate, an initially promising anti-epileptic drug which was recommended for approval in late 1992 and actually licensed for use in July 1993. In mid-1994, scarcely a year following licensure of Felbamate, a warning was issued to physicians, noting that Felbamate was linked to risk of aplastic anemia, and that some fatalities had resulted.

The above example and others like it should be well documented in medical and pharmaceutical journals, and would have proved a much more solid argument for the author than his use of "might-have-been" alarmist estimated statistics, like those used at the beginning of the article. The misuse of statistics is not needed to illustrate this case of government gone bad.

Alicia Oakley
Greenville, IL
Eric Tellefsen
Elberon, NJ

Alexander Volokh replies: For the benefit of Ralph Dreger and Gordon LaBedz, let me make clear that I, too, am not in love with drug and medical-device manufacturers. Neither the government nor industry is in the medical business for kindness alone. The true question, though, is how to avoid the FDA making an already risky situation worse.

Dr. LaBedz suspects that my estimated "lives saved" will be short and low-quality. I suspect that the folks whose lives are saved may think differently. Some of the treatments may cost hundreds of thousands of dollars, but I assure you that the FDA has quite other criteria in mind.

Mr. Dreger's question of drug patents is a thorny one, but FDA reform can proceed independently of patent law, and patent law can be changed regardless of what the FDA looks like. The two questions are connected, but independent. As for his second point, if all the FDA did was guard against fraudulent labeling, there would be no problem.

Saul Kent's proposal, which would allow consumer choice, is a good one. I wouldn't lay the blame for the anti-arrhythmic drug deaths, though, on the FDA. Until we become all-knowing, science will be tricky and intelligent folks will disagree. Given this, the true public health policy is *not* to ban things that don't work, but to empower people to choose what they think might work and to take the risks that may save their lives.

I agree with David Anast that we should be concerned about the survival of the device-manufacturing industry. I wouldn't be too concerned, though, about the *number* of companies that are actually inside the United States. If, regulation aside, it's really cheaper to do the same work in India, then we may be better off if companies go there. And if mom-and-pop plants go under but a multinational acquires them, then we consumers may not lose anything.

As to my statistics, I refer the reader to Sam Kazman's "Deadly Overcaution: FDA's Drug Approval Process" (*Journal of Regulation and Social Costs*, August 1990). Here's how they work. In 1988, the FDA approved the ulcer drug, misoprostol. The FDA estimated that gastric ulcers caused 10,000 to 20,000 deaths a year, and misoprostol was reportedly 94 percent effective. FDA review took 9.5 months (.79 years), which makes a death toll of about 7,500 (10,000 × .94 × .79) to 15,000 (20,000 × .94 × .79).

Naturally, these are just crude approximations. Of course, if the FDA had approved misoprostol immediately, not everyone would have used it. There are methodological questions—do we count FDA delay from the moment of the application or from the moment the drug is sold anywhere? But the FDA hasn't admitted that the FDA could be responsible for any deaths. If we can start arguing over the numbers, the FDA debate will have made a great leap forward.

Alicia Oakley and Eric Tellefsen claim that such numbers are useless and that I should have focused on FDA-approved drugs and devices that killed people anyway. I disagree. The "simple fact that the FDA disallows our citizens and their selected health care providers freedom of choice" is a powerful fact for libertarians, but isn't enough for most people. When people die from bad drugs and devices, they already make headlines. Folks like Sid Wolfe of Public Citizen latch onto such examples and use them to advocate vastly expanding the FDA. But drug-lag victims, even when there are thousands of them, are invisible. We need to put faces on the victims.

Regulation Blues

"Slash and Burn" by Rick Henderson (May) was a well-reasoned analysis of the frustrations that have fed the growing regulatory reform movement. The difficulties the Kahle family experienced using a well that provided fresh water cleaner than government standards required is symptomatic of the rigidity that has given the United States the most costly regulatory system of any industrialized nation.

This state of affairs could be alleviated by regulatory reform legislation containing risk assessment and cost-benefit analysis. These procedures, which the U.S. House has passed and the Senate will be considering in June, would bring about a reallocation of resources to more cost-effective programs. They "could save an additional 60,000 lives per year" at no increased cost to taxpayers or the private sector, according to the Harvard Center for Risk Analysis.

Arthur E. F. Wiese Jr.
Communications Committee
Chairman
Alliance for Reasonable Regulation
Washington, D.C.

Corrections

In "Exclusive Justice" (May), the results of Randy Weaver's trial were misreported. Although acquitted of all weapons-related charges, Weaver was found guilty of failure to appear for trial and for not complying with the terms of his original release.

In April's "No Fruits, No Shoes, No Service," the effect of heightened labor costs was miscalculated. If labor costs represent 20 percent of food prices and, other things being equal, farm wages double, food prices would increase 20 percent.

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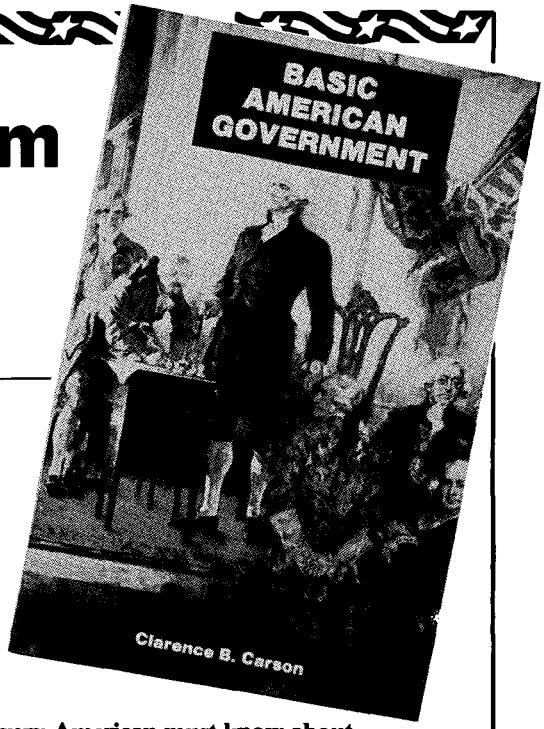

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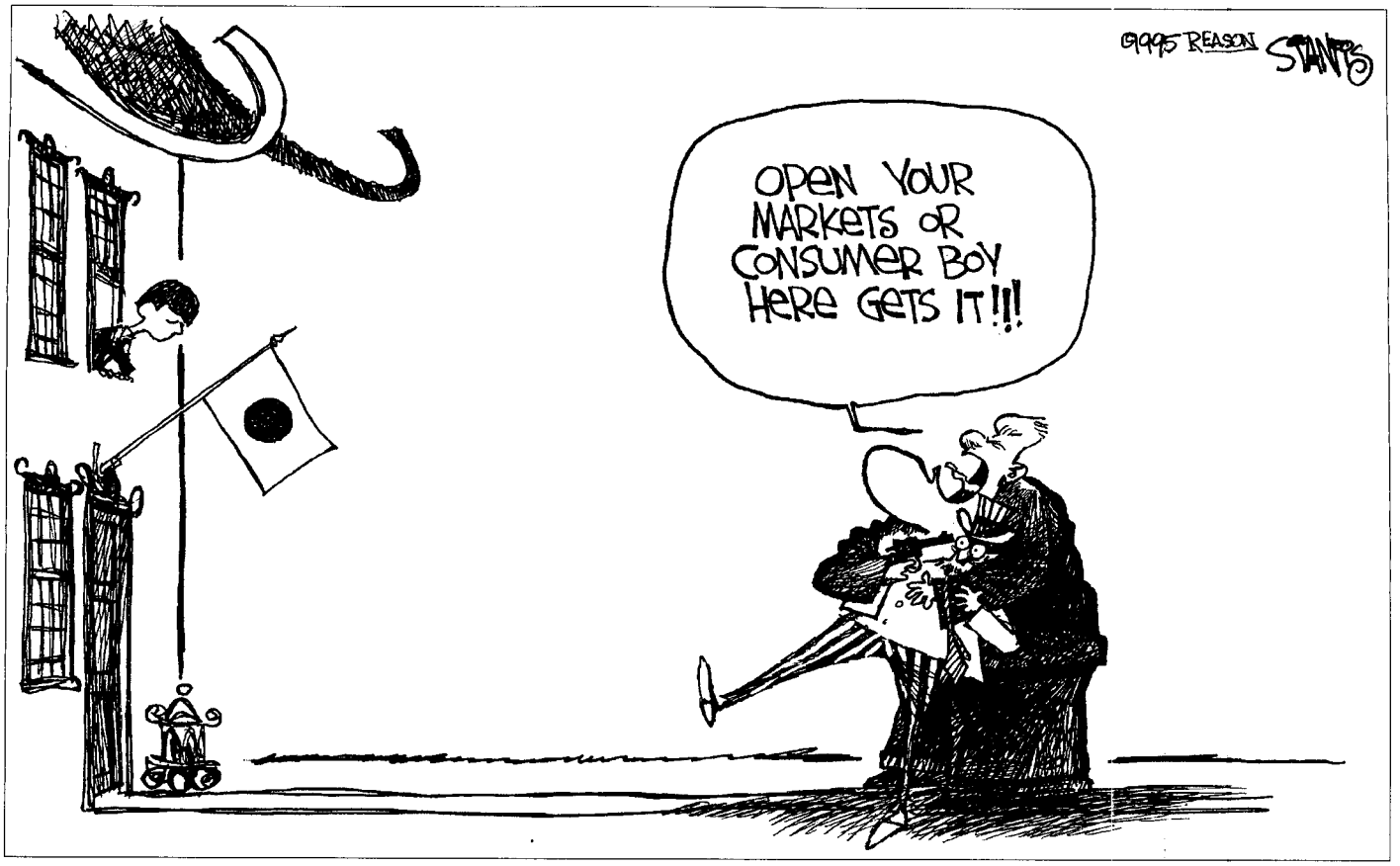

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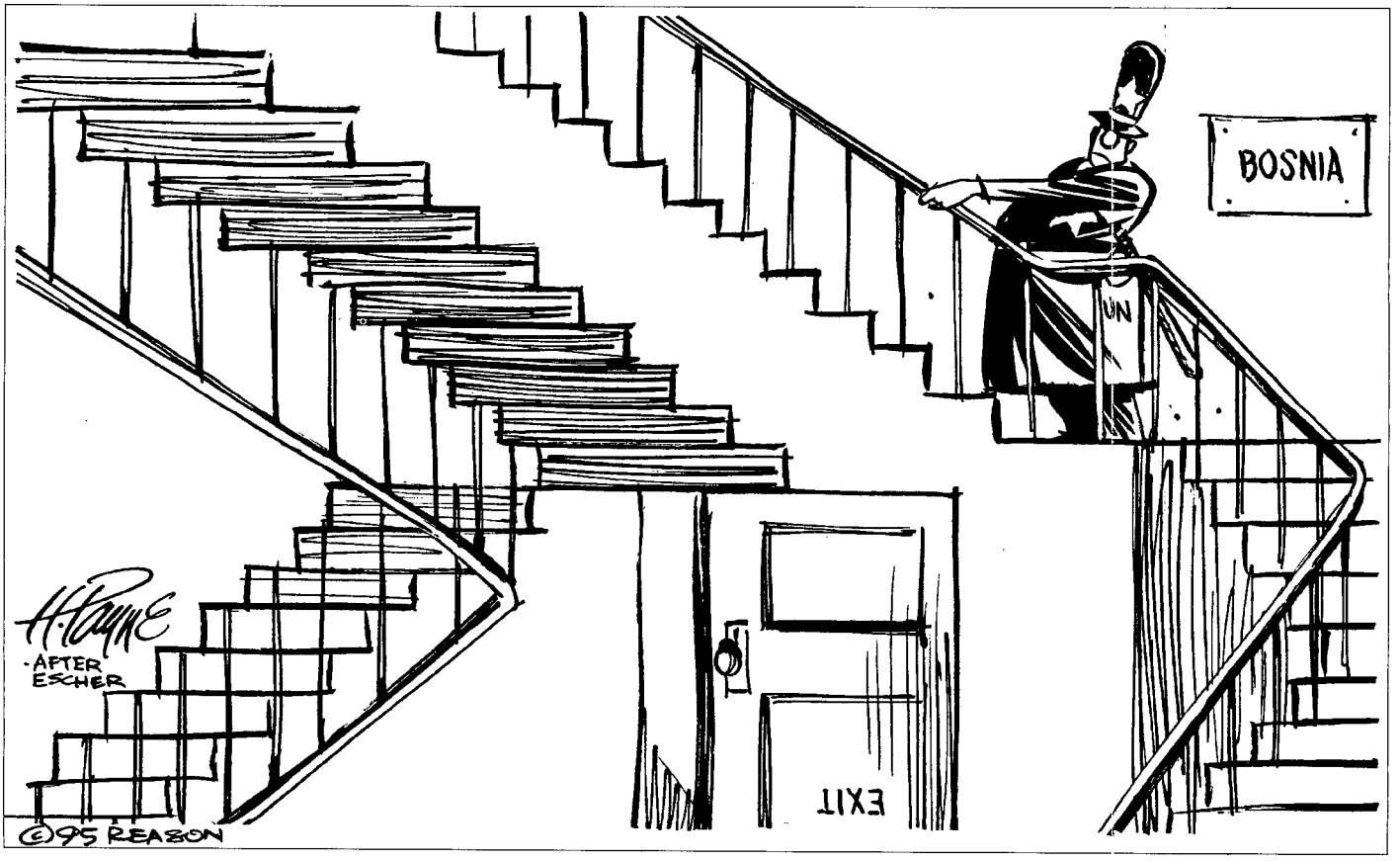

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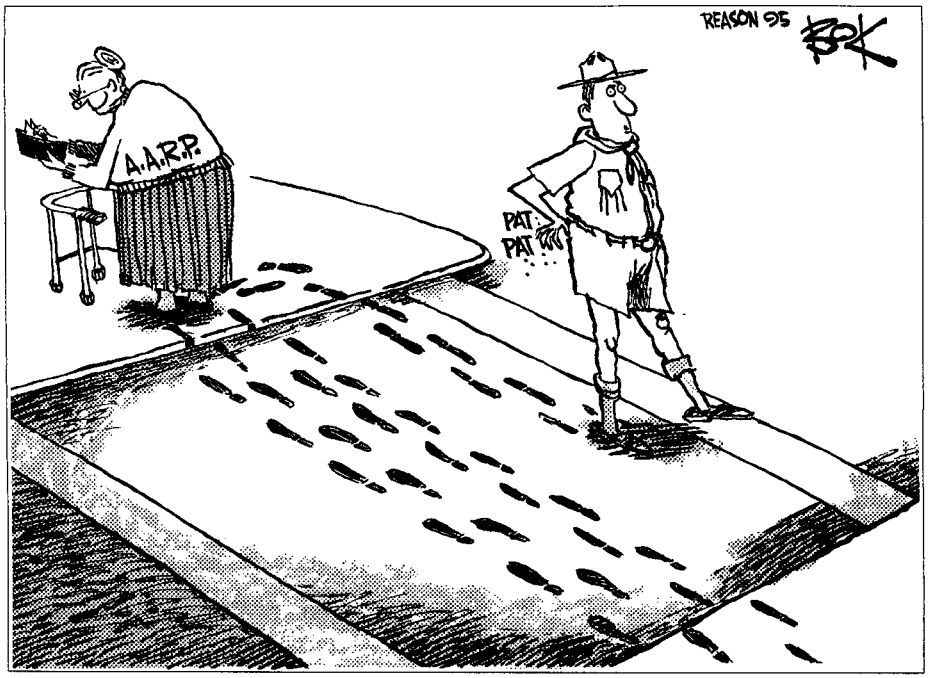


CHIP BOK

Workers in Yakima, Washington, forgot just one thing when finishing a building last year. They forgot to connect the building's sewer lines to the main sewage pipe. For almost a year, the pipes filled with raw sewage until they couldn't hold anymore, and the building's toilets basically exploded. The building housed the city's public works administration.

No one will ever accuse Fresno, California's Women International Network of holding a grudge. The women's group selected as speakers at a charity dinner convicted rapist Mike Tyson and Benjamin Chavis, who was ousted as head of the NAACP following a financial scandal that arose after a former aide accused him of sexual harassment.

In Moscow, the entire 10th precinct of the city's police force has been suspended for pandering. Reportedly, officers even drove hookers to their clients in police cars.

A former assistant stage director has filed suit against New York City's Metropolitan Opera. She claims that she was fired because she is not a homosexual man.

Police had an easy time finding the man who robbed a restaurant in Pittsburgh. He had left his real name, address, and Social Security number on a job application he filled out just before knocking off the place.

Two white officers in New York's Grand Central Terminal grabbed businessman Earl Graves Jr. and frisked him. They had been alerted to look out for an armed 5-foot-10 black man with a mustache. Graves is 6 feet 4 inches and clean shaven. But he is black.

A senior official of the Mormon Church warned followers against patronizing groups that purport to enhance one's self-esteem. Instead, he urged Mormons to live their lives according to biblical teaching. So the church has now been sued for $189 million by the owners of Life Management International, a self-esteem company. Although their company was not mentioned by name, the owners claim injurious falsehood, defamation, and intentional infliction of emotional distress.

Our Hypocrites of the Month Award goes to CBS Sports and announcer Pat O'Brien. The network ran a hatchet-job piece on the Ultimate Fighting Championship, a no-holds-barred martial arts contest. The piece, which decried the alleged brutality of the pay-per-view event, highlighted some of the tournament's bloodiest moments over the air on a Sunday afternoon. Then O'Brien urged viewers to stay tuned for an upcoming boxing match. This as boxer Jimmy Garcia lay dying in a hospital from injuries suffered in a nationally televised boxing match.

Three inmates have sued the Mini-Cassia Jail in Idaho, charging that jailers' refusal to give them a midnight snack was cruel and unusual punishment.

The manager of a Carvel's ice cream store in Southington, Connecticut, has been suspended. He refused to write "Happy Birthday" in Spanish on a cake, telling the customer, "This is America."

School officials in Wheeling, West Virginia, know just how to deal with students caught smoking or chewing tobacco on school grounds. They take them to court. School officials there now file complaints against those who violate school policies against tobacco. The maximum fine is $5.00 plus court costs.

The National Rifle Association is all for the Second Amendment. But it seems to be squeamish about the rest of the Bill of Rights. The First Amendment seems to give them particular problems. James Warner, assistant general counsel to the NRA, was set to testify, as a private citizen, against a constitutional amendment to ban flag burning. Then Rep. Gerald Solomon (R-N.Y.), a sponsor of the amendment, got on the phone to the NRA to complain, and Warner cancelled his testimony at the last minute.

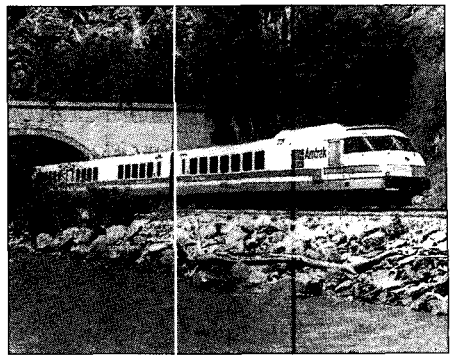
In Camden, New Jersey, the family of an alleged killer who fell to his death while trying to escape jail has filed suit against the facility. They charge officials with failing to maintain a reasonably safe facility.

—Charles Oliver

Train Stopped A-Rollin'?

Amtrak may finally go the way of the buffalo.

By Brian Doherty



Amtrak receives nearly $1 billion a year in federal subsidies, and every route loses money.

AMTRAK'S QUARTER-CENTURY CHUG at taxpayer expense may finally be running off the rail. The House Budget Committee has targeted eliminating its federal subsidy entirely by 2002. This year's funding bill, just out of the railroad subcommittee at press time, is only a tentative step; it trims federal subsidies over the next four years, with some reforms to allow more contracting out and ending some federal micromanagement of such matters as route cutbacks.

Amtrak squeezed $972 million from taxpayers in 1995 to cover its losses while taking some halting steps toward cutting the shortfall. Amtrak swears it can achieve $430 million in savings by cutting some staff and limiting a few of the most egregiously money-losing routes. (*Every* route loses money.)

But a recent study from the General Accounting Office concludes that those sort of half-measures will never get Amtrak off the dole. The GAO points out some problems for Amtrak that aren't being addressed by current reform ideas:

- For the past decade, Amtrak's equipment and facilities have averaged $60 million a year more in depreciation than new investment.
- The contract under which Amtrak leases its track from private freight railroads comes up for renewal in 1996, and the track owners will be looking for more than their current $90 million a year.
- Passenger revenues have declined by 12 percent just since 1990.

The GAO report doesn't address restrictive labor regulations, including mandated severance packages that can run as long as six years under the Railway Labor Act and the Federal Employees' Liability Act. This year's Amtrak bill doesn't eliminate those regs, but it puts in motion a bargaining process that might result in ending them.

But even after eliminating those rules, it remains to be seen whether intercity train travel as a daily part of the nation's transportation grid can ever be truly profitable. The GAO argues that it can't be, pointing out that even in Japan and Europe, "where population densities and geographical conditions are more conducive to rail travel than they are in the United States, intercity passenger service requires substantial public funding."

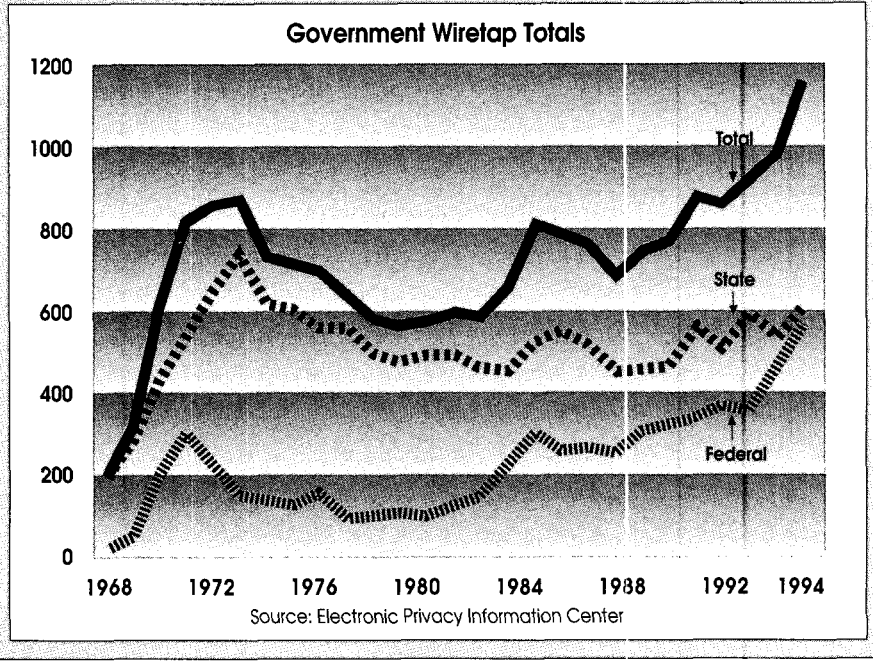
With the will to continue that funding apparently fading in the face of the quest for a balanced budget, Amtrak's final ride may be right on schedule.

Listen Up!

Federal wiretapping reaches all-time high.

By Brian Doherty

Driven by an increase in federal narcotics investigations, the Clinton administration hit a record in federal wiretapping for the second year in a row, with 554 new taps authorized in 1994—a 23 percent increase over the previous year's record 450. State wiretaps also hit a 15-year high with 600. Seventy-six percent of total wiretap orders were for drug investigations, and only 17 percent of the conversations recorded produced any evidence prosecutors thought incriminating. The average cost for each federal wiretap is $66,783, although one federal tap in Indiana cost $839,421.



Weights and Half-Measures

The federal government reconsiders marijuana and crack sentences.

By Jacob Sullum

SAVVY U.S. MARIJUANA GROWERS have learned never to cultivate more than 49 plants at a time. That rule has nothing to do with horticulture. Under federal sentencing guidelines, each plant in a garden with 49 or fewer plants is considered equivalent to 100 grams of dried marijuana. In a garden with 50 or more plants, each counts as 1,000 grams.

This scheme creates a sharp sentencing cliff, imposing dramatically longer prison terms based on small differences. Recognizing the unfairness of such disparities, the U.S. Sentencing Commission has unanimously approved an amendment that applies the 100 gram standard to all marijuana plants.

Robert Kampia, director of government relations for the Marijuana Policy Project, calls the amendment "a small step in the right direction." He says the one-kilogram standard is unrealistic, since one plant rarely produces more than 100 grams of dried marijuana. "When the U.S. Sentencing Commission soberly examines such policies," he says, "it becomes clear that they were based on hysteria and political posturing."

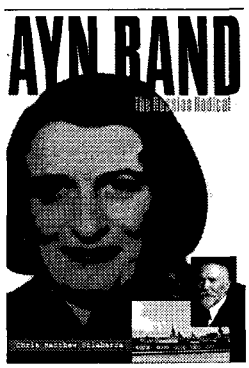
The commission came to a similar conclusion regarding the sentencing distinction between crack and cocaine powder. Under the current guidelines, one gram of crack is treated as equivalent to 100 grams of cocaine powder, resulting in sentences several times as long for the same amount of cocaine. The commission unanimously concluded that the 100-to-1 ratio was inappropriate, and a majority agreed that the two forms of the drug should be treated the same for sentencing purposes.

The commissioners noted that crack and cocaine powder are pharmacologically identical and that the latter can be easily converted into the former. Furthermore, since conversion occurs far down the distribution chain, the 100-to-1 standard punishes low-level dealers more severely than major traffickers. The commissioners seemed especially troubled by the fact that nearly 90 percent of federal crack defendants are black. The racial impact of crack sentences has generated considerable controversy in recent years, and the commission received 9,000 letters supporting reform.

The commissioners conceded that crack cases may be more likely to involve violence, juveniles, or other aggravating factors. Indeed, "under the amended guidelines, crack offenders will receive sentences that are, on average, generally at least twice as long as powder cocaine offenders involved with the same amount of drug," mainly because of aggravating factors.

The marijuana and crack amendments, which will go into effect on November 1 unless Congress overturns them, are expected to reduce the sentences of several hundred marijuana defendants and several thousand crack defendants a year. The commission has not yet decided whether the changes will apply retroactively. Furthermore, only Congress has the authority to change the mandatory minimum sentences established by statute: five years for 100 or more marijuana plants and for five grams or more of crack, 10 years for 1,000 or more plants and for 50 or more grams of crack.

The commission has asked Congress to eliminate the distinction between crack and cocaine powder in applying the mandatory sentences. "I'm not optimistic the statute will change," says Julie Stewart, president of Families Against Mandatory Minimums. "The guideline change might slip through." Although Attorney General Janet Reno has expressed concern about mandatory drug sentences, the Justice Department is opposing the commission's proposal. Right now, Stewart says, Congress is not paying much attention to crack sentences. Which may be just as well.



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Balance Sheet

By Rick Henderson

Assets

Flight Path. Airport privatization lands in the United States. BAA, the British firm that

operates London's Heathrow, Gatwick, and Stansted airports, gets a 10-year contract to run the Indianapolis airport. BAA predicts it will save $140 million in operating costs over the life of the contract; it will cut passenger fees by $2.00 per passenger, or about 25 percent. Meanwhile, the Newark, Syracuse, and New York's JFK and LaGuardia airports may also gain private operators.

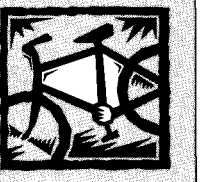
Ram Tough. A single bill by freshman Rep. Dick Chrysler (R-Mich.) could end most federal industrial policy. Chrysler's plan to abolish the Department of Commerce, which has the blessings of Newt Gingrich and Bob Dole, would terminate the Economic Development Administration, the Advanced Technology Program, and the International Trade Administration. What about government support for breakthrough technologies? "If [something] is a good invention," said Chrysler, "let the private sector invent it."

Parallel Bars. The federal government may lose a key weapon in the drug war: the ability to simultaneously prosecute drug dealers in civil and criminal court. The Ninth Circuit Court of Appeals says seizing a defendant's assets in a civil proceeding while trying the same person in criminal court for that offense constitutes double jeopardy. More than 300 convictions in the Ninth Circuit's region alone may be overturned.

Band Stand. Drawing on the analysis of Peter Huber and REASON's Tom Hazlett, the Gingrich-connected Progress & Freedom Foundation proposes abolishing the FCC. By establishing property rights in the broadcast spectrum and ending federal ownership of the airwaves, the Progress & Freedom plan would let current license holders own their frequencies; the feds would auction the rest of the spectrum. Gingrich tells *Broadcasting & Cable* he wants the FCC phased out within five years.

Liabilities

Lonesome Highway. Let's say you need some new wheels. You can't afford a Lexus because of those 100 percent tariffs. How about a bike? Not so fast, says *New York Times* trend spotter Peter Passell. He says the Clinton administration may use anti-dumping rules to sock the Chinese, who make the lion's share of imported bicycles, with 50 to 100 percent tariffs. Look for higher prices and shortages right around the Christmas season.



Parochial Interests. When federal privatization plans conflict with the self-interest of individual Republicans, guess what wins? D.C.-area House members balk at plans to privatize air traffic control, lest they lose the power to micromanage Washington's National and Dulles airports. Western senators squawk at proposals to privatize federal power marketing agencies. And House Budget Committee Chairman John Kasich opposes postal privatization because his father is a letter carrier.

Lousy Aim. Reeling from criticism of its fundraising letters, the National Rifle Association shows how playing defense can be, well, offensive. Calling militia organizations "hate groups" and "terrorist groups," NRA Executive Vice President Wayne LaPierre calls for congressional hearings to investigate the militia movement. (See "Extreme Prejudice," July.)

Leveled Heads. Egalitarianism runs amok in Colorado. Starting this year, most Colorado public high schools designate any student with a 4.0 grade-point average *valedictorian*. As a result, reports *Newsweek*, Boulder High graduates 26 "valedictorians" this spring. At Smoky Hill High, the eight graduates who are at the head of the class of '95 will read parts of a single speech.

It's a Date

Government costs less this year.

By Rick Henderson

BY THE TIME YOU READ THIS STORY, you may have stopped working for the government. For 1995, anyway.

Each year, Americans for Tax Reform totes up the cost of federal, state, and local taxes, spending, and borrowing, adds the direct costs of quantifiable regulations, divides by 365, and comes up with Cost of Government Day—the date on which the average American worker has earned enough gross income to pay off the financial obligations imposed by governments. Cost of Government Day falls on July 9 this year, two days earlier than in 1994, and a week earlier than in 1993.

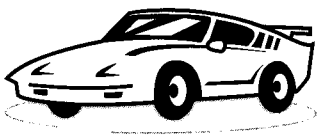
Alan Philp, who compiles the government-cost figures for ATR, says several factors have led to a slightly shrinking state: steady economic growth, which tends to reduce demands on social-welfare programs; a continuing reduction in military spending as a percentage of national income; and (to date) the lack of success Bill Clinton has had in imposing new federal regulatory programs. In 1992, the first year the Bush administration's Americans with Disabilities Act, Clean Air Act Amendments of 1990, and 1991 civil rights act all took effect, Cost of Government Day arrived on July 18.

Not that Clinton doesn't want to make government more expensive. "We're lucky Clinton put all his [regulatory] eggs in the health care basket," says Philp. He says ClintonCare's mandates would have put Cost of Government Day well into August.

Cost of Government Day may start arriving sooner. The 1996 House budget would make Cost of Government Day fall at least two days earlier than it would under the president's budget. And by 2002, without any of the GOP's proposed regulatory reforms, Republican plans to balance the budget could move Cost of Government Day up by another 17 days.

King of the Highway

Congress may return speed limits to states.



By Ed Carson

ONE OF THE FIRST LESSONS OF DRIVing is that no one follows the speed limit on highways. In fact, a recent study of New York's rural interstates showed that 96 percent of drivers were breaking the 55 mph limit.

Twenty-two years after they were imposed to deal with the energy crisis, an effort to repeal federal speed limits is cruising through Congress. Sen. Don Nickles (R-Okla.) has sponsored legislation that would return speed limits to the states. "Oklahoma is not Connecticut," he says, arguing that local people know better what speeds are appropriate for their highways.

Officials at the Federal Highway Administration and the National Highway Traffic Safety Administration disagree, claiming such a move would add thousands of highway fatalities. Nonsense, says Jim Baxter, president of the National Motorists Association. He points to a preliminary Federal Highway Administration report, which has not yet been released to the public, that finds no link between posted speed limits and actual driving speeds.

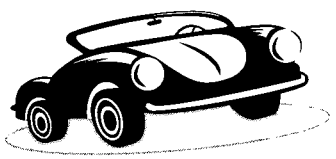
Baxter argues that setting speed limits too low may actually cause more accidents. "Drivers who obey the current speed limit are not in synch with the traffic flow and that creates problems."

Most states already have a formula for setting speed limits on roads from city streets to highways. Under this rule, limits are set at whatever speed the 85th percentile of people actually drive. Traffic engineers assume this is a safe speed that minimizes traffic disruptions.

The Nickles bill has been passed out of committee and attached as an amendment to a highway construction bill. No timetable for a vote on it has been set, but the bill appears to have strong popular support. "We've received more calls on this issue than on anything else we've done this year," says a Nickles aide.

Electric Blues

The bad news about zero-emission cars



By Nick Gillespie

AS GOVERNMENT DEADLINES FOR zero-emission vehicles draw closer, the scientific research community is telling politicians to pull the plug on the only vaguely plausible form of such a contraption: the electric car. Recent studies from the General Accounting Office, Carnegie-Mellon University, and the Reason Foundation all conclude that given the state of battery technology, the limitations and expected costs of the vehicles, and the anticipated environmental benefits, electric cars have a long way to go before they're up to speed.

California law mandates that by 1998 automobile manufacturers must sell zero-emission vehicles equal to 2 percent of all new automobiles. The proportion rises to 5 percent in 2001 and to 10 percent in 2003. Eleven eastern states, including New York, New Jersey, and Maryland, have adopted or are considering similar legislation.

The three new studies, however, suggest that such legislation is more wish fulfillment than sound public policy. The GAO report, which makes no specific policy recommendations, notes, "The ultimate viability of electric vehicles for widespread transportation cannot now be predicted or ensured." The report, which also comments on electric-car programs in foreign countries, details five major barriers to the vehicles—battery problems, gaps in infrastructure, uncertain safety, unproven markets, and high purchase/maintenance costs—and characterizes the "extensive efforts" necessary to eradicate the problems as "inherently risky."

The Carnegie-Mellon research, conducted by economist Lester B. Lave and engineering professors Chris T. Hendrickson and Francis Clay McMichael, "focus[es] on the environmental consequences of producing and reprocessing large quantities of batteries to power electric cars." Writing in *Science*, the authors conclude that since electric cars would have to rely on lead batteries, they will actually release 60 times more lead per kilometer of use relative to a comparable car burning *leaded* gasoline. The authors also note that nickel-cadmium and nickel metal hydride batteries—the two best alternatives currently available—are both incredibly expensive and highly toxic to humans and the environment.

The Reason Foundation study, by Peter Gordon and Harry W. Richardson, both professors of economics and urban planning at the University of Southern California, stresses the relative inefficiency of electric-car mandates at achieving their primary goal of reducing motor vehicle emissions. For instance, where emissions-based vehicle registration fees cut pollution at a cost of $1,650 per ton, it costs between $29,000 and $108,000 to get the same benefit with an electric car.

"Even when nonmarket benefits such as environmental effects are factored in, there is no evidence that [electric vehicle] mandates make economic sense," write Gordon and Richardson. "There are many more productive means of reducing... emissions, including efforts to accelerate the scrapping of older, polluting vehicles, mobile emissions testing, improvement in emissions technology..., cleaner fuels..., and [alternative fuel vehicles] other than electric-powered."

UNREASONABLE ACCOMMODATION

THE CASE AGAINST THE AMERICANS WITH DISABILITIES ACT

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BY BRIAN DOHERTY

Though only five years ago, 1990 was a different political era. A kinder, gentler Republican president was in the White House, the Democrats controlled Congress, and Sen. Edward Kennedy praised Senate Minority Leader Bob Dole for his key role in passing a new anti-discrimination law.

Any sweeping regulatory package in civil rights wrappings that wins the enthusiastic support of those two is bound to mean trouble. The law was the Americans with Disabilities Act, and it gives the feds veto rights over such issues as: whether a prospective employer can ask a would-be truck driver if he has epilepsy; how far grab bars must be from the back walls of toilet stalls; what surfaces are permitted for subway platforms; how restaurant seating must be arranged; and dozens of other aspects of running businesses and city governments. The law has created an entire industry around interpreting it and, as the old cliché goes, provided plenty of work for lawyers, if not for the handicapped.

In theory, the ADA merely banned discrimination against the disabled in employment and public accommodations, and only forced employers and storekeepers to make "reasonable accommodations" that did not constitute an "undue burden." Unlike its predecessor law, the Rehabilitation Act of 1973 (which forbade discrimination against the disabled only in federally funded programs), the ADA gave individuals the right to sue over alleged violations.

No grassroots movement campaigned for the bill, but it was phenomenally popular in Congress, spearheaded by various congressmen with disabilities themselves or disabled friends or relatives. It passed the Senate 76–8, and the House 403–20. (Not even firebrand Newt Gingrich could bring himself to vote against it, though Dick Armey did.) Despite warnings about huge costs and runaway litigiousness, President Bush loved the feel-good law, especially as he prepared for campaign '92.

"The message from the Bush administration was not a subtle one: 'We're going to support this. You can try to block it, but good luck—you're not going to,'" says business lobbyist John Tysse.

Facing such daunting odds, business groups settled for minor concessions, such as a limited right to do preemployment physicals and the right not to hire current users of illegal drugs. But the greatest business victory in limiting the ADA was taken away in a civil rights bait-and-switch. The original ADA's remedies did *not* include punitive damages or jury trials, but the 1991 Civil Rights Act retroactively amended the law to include them.

Once the bill was in motion, a disabled person from every member's district was sent to lobby for the ADA. "You'd look out in the hall, and see 50 people in wheelchairs and people climbing out of wheelchairs trying to crawl up the Capitol steps, and logic and rationality go out the window," reminisces Lori Eisner, a staffer for Rep. Tom DeLay (R-Tex.), one of the few congressmen to vote against the ADA. "The ADA is filled with lack of definition, everything's open-ended, but the attitude was, this is a feel-good thing, let the courts decide."

The "feel-good thing" is now reality, and it doesn't feel nearly as good as promised. The ADA has emerged as a prime example of congressional irresponsibility. While many of its specific results surely could not have been intended, the law's vague prescriptions and wide

ART MATSON

The ADA's intended beneficiaries—blind, deaf, or wheelchair-bound Americans now on public assistance—are no more likely to be in the mainstream workplace now than in 1991. Most of the law's benefits have accrued to the already-employed, and then mostly to plaintiffs with back injuries or emotional problems, not to the sympathetic lobbyists who stormed Capitol Hill.

reach guaranteed it would become, and will remain, an expensive headache to millions without necessarily improving the lives of its supposed beneficiaries.

Many presumed benefits haven't yet blossomed, but the costs are all too real. Businesses as tiny as family-owned diners and corner dry cleaners are dodging regulators, in some cases paying tens of thousands in legal costs. Cash-strapped local governments are spending billions to comply with public-accommodation requirements. And the ADA's intended beneficiaries—blind, deaf, or wheelchair-bound Americans now on public assistance—are no more likely to be in the mainstream workplace now than in 1991. Most of the law's benefits have accrued to the already-employed, and then mostly to plaintiffs with back injuries or emotional problems, not to the sympathetic lobbyists who stormed Capitol Hill.

We've all heard ADA anecdotes that strike most people (except plaintiffs' lawyers and the judges who don't throw these suits out on their face) as patently absurd: the overweight fellow who sues for bigger seats in theaters, the guy who claims he brought a gun to work because of a psychiatric difficulty, the nightclub ordered to provide space for possible wheelchair-bound strippers, the woman who claims her offensive smell is a protected disability. Such cases aren't typical, however, and in most of them the plaintiff loses.

But they do suggest the opportunism the law has spawned, the potential scope of its definition of civil rights, and the difficulty of interpreting such vague terminology as "reasonable accommodation." Five years and two important elections after the ADA passed, it is finally possible to give it the sober scrutiny it deserved before it became law.

The Costs of Doing Good

The ADA's total costs are impossible to estimate with certainty. All we can know about are individual cases, and even there most people don't want to talk. With a law that is usually triggered by activist complaints, says a restaurateur, "in a lot of cases someone is afraid that something they say is going to come back to them."

The law rewards "good faith" compliance, so it behooves any business owner or manager not to say anything publicly that might betray a lack of good faith toward the ADA or its application. Lawyers, pundits, consultants, city officials, trade group reps, even people forced to pay tens of thousands trying to obey the law, all emphasize they have no problem with the concept of the ADA, just the uncertainty and stringency of its application.

Richard Kubach Jr. is one of the very few victims of the law who are willing to talk about it. For the past 22 years, he has run Philadelphia's Melrose Diner. Opened by Kubach's father, the diner celebrated its 60th anniversary in March and attracts a clientele that ranges from bums to yuppies. It is a South Philadelphia landmark, with 100 full-time equivalent employees, doing about $5 million a year in business.

Kubach shows hints of Stockholm Syndrome when he talks about how helpful the local disabled activist group who challenged his diner's four front steps were in explaining to him what he would have to do to satisfy them. "Outside of the fact that it was through litigation, they've behaved in a favorable way," he says, sounding weary and beaten.

"It was difficult to get a real handle on what was required. I attended conferences in D.C. with top officials of Justice and different departments responsible for overseeing the ADA, and in front of several hundred people they admitted they were unclear about the direction things would go," he says. The specific meaning of many ambiguous phrases in the law, such as "undue burden" and "reasonable accommodation," will have to be revealed through case law. But we don't have a lot of that yet—and it takes cases like Kubach's to establish it.

Compliance cost Kubach nearly a year and about $65,000. He was delayed by the harsh winter of 1993–94, which made the activists think Kubach was intentionally dragging his feet. But it was hard to build a ramp when the area in question is buried in ice, snow, and sleet.

The ultimate ADA goal of complete, unhindered access with no need for any assistance still isn't met at the Melrose Diner. Given the building's stainless steel exterior and 60-year-old structure, a complete retrofit was impossible. There are still, for example, no barrier-free paths to the bathrooms inside.

And for all Kubach's expense and trouble, no hugely pressing social problem has been solved. Previously, says Kubach, "the problem of the disabled came up infrequently, but they were usually coming with people who could bring the wheelchair up the stairs, or we could send busboys out to get them who could lift them up. But it wasn't considered satisfactory to send people out to lift them, or bring them through the kitchen." Hence the lawsuit.

Restaurateur Blair Taylor isn't as sanguine about his experience with the ADA. He owns the Barolo Grill in Denver—"a very high profile, upscale, Jags-and-Rolls-

Royces type of Italian restaurant in an expensive shopping district called Cherry Creek." As we talk the week before Valentine's Day, he is interrupted by nearly a dozen phone calls within an hour, seeking reservations for Valentine's Day. The Valentine's Day reservation book has been packed for a couple of weeks already.

Taylor is "a 40-year-old yuppieish kind of white guy. I'm a safe, wonderful target for these things." "These things" for Taylor mean nearly two years of legal conflicts with both the Justice Department and the city of Denver that ended up costing around $100,000 in construction and legal fees.

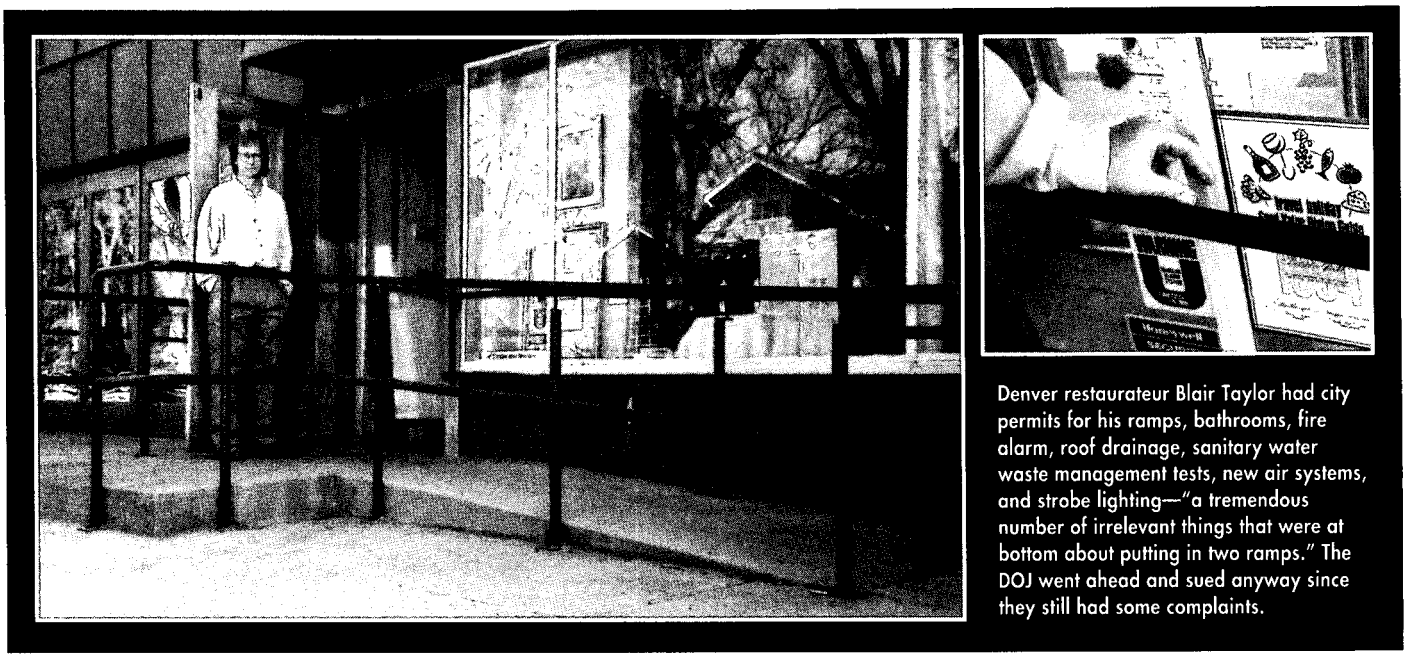
Taylor's troubles started in December 1992, just after opening the Grill, with a phone call from the DOJ. "Apparently they had been peering in during construction, and noticed we hadn't done some work we should have done. They told me they were investigating complaints for noncompliance," he says. He wasn't immediately responsive: "The first week of running a new restaurant isn't when you have a lot of free time." Taylor insists that he could take a walk from his restaurant and find 40 businesses in worse ADA shape than his was. He thinks he may have been under surveillance because of complaints against the former owner of a restaurant in the location, but "never can I get a specific answer from DOJ. They'll just say, 'No, Mr. Taylor was a horrible person.'"

Not exactly a horrible person, but DOJ civil rights lawyer Kate Nicholson, who worked on the Barolo case, does call Taylor "very difficult." She denies any malice or example-making, stressing that Taylor made continual promises to make changes by given dates and missed them all. DOJ isn't generally quick to sue, she says.

DOJ was unhappy with the four-inch step up to the door of the Barolo Grill, even though parking valets would always be available to help wheelchair users over the hump. Justice Department enforcers also didn't like the 11-inch raised platform in the back of the Barolo, with nine tables in addition to the 17 on the main floor.

A ramp to the platform was built, destroyed, and then rebuilt in response to Justice's complaints. The first time the ramp wasn't long enough for DOJ's very detailed building standards. The ramp is now the requisite 11 feet long and 41 inches wide to navigate a 11-inch rise, costing Taylor three tables worth of space in his usually sold-out restaurant.

The front ramp created a whole new set of problems, since it violated Denver city ordinances and required variances. "I said, 'I promised the federal government I'd do this ASAP, and city law won't let me do it?'" says Taylor. "It was an eight-and-a-half month process through various city boards.



Denver restaurateur Blair Taylor had city permits for his ramps, bathrooms, fire alarm, roof drainage, sanitary water waste management tests, new air systems, and strobe lighting—"a tremendous number of irrelevant things that were at bottom about putting in two ramps." The DOJ went ahead and sued anyway since they still had some complaints.

"The federal government at the same time are saying, 'Faster, faster.' They'll say Mr. Taylor went back on his word several times, but the city wouldn't let me keep my word." DOJ's Nicholson was uncertain of the details of Taylor's problems with the city. All she knew was, he was violating the law and wasn't quick enough to remedy things.

By February 1994 Taylor had city permits for his ramps, bathrooms, fire alarm, roof drainage, sanitary water waste management tests, new air systems, and strobe lighting—"a tremendous number of irrelevant things that were at bottom about putting in two ramps." The DOJ went ahead and sued anyway in April, since they still had some complaints.

"They're demanding a $50,000 fine, the maximum for a first-time offender. And the price tag to go into federal court is very expensive anyway. We're forced to go to a settlement conference. I say that I'm in complete compliance, and if I can just pay a fine I'd like to go home."

DOJ didn't agree. Its complaints included: The handrails on the entrance ramp had two more inches between them and the restaurant's window than the law allows; the restroom grab bar was mounted two-and-a-half inches too far from the back wall;

PHOTOS: BRIAN DOHERTY

carpeting ended two inches before the patio door; and the wine storage room didn't have a ramp to its door (which was also not wide enough).

DOJ's biggest complaint was the back alley exit ramp, insisted on by Denver as a fire-safety precaution. Because delivery trucks use the alley, the handrails did not extend all the way to the bottom of the ramp, as the ADA demands; if they did, trucks would knock them down forthwith. The ramp was also steeper than the ADA allows. Since federal ADA regulations don't require this exit ramp, the feds decided Taylor should remove it. Disgusted, Taylor says, "You can't use common sense—would you rather use a ramp slightly too steep without handrails all the way to the end, or would you rather die in a fire?" The ramp is now gone.

Private citizens aren't the only ones bedeviled by strict application of the ADA. The Washington (D.C.) Metropolitan Area Transit Authority has already spent almost $40 million on ADA reform, says spokeswoman Patricia Lambe. So it's not just a matter of money that made them rebel against a particular ADA requirement that they found irrelevant and completely unnecessary. "It's principle and science," Lambe insists.

The suit was settled with a $16,000 fine. Six thousand dollars of it went to protesters from Atlantis/ADAPT, a local handicapped-activist group that picketed the Barolo Grill.

"The federal government flew two attorneys for every meeting, gave them hotels, rental cars, meals. They came in from D.C. seven times," says Taylor. "We figure at least $250,000 was spent to force a restaurant in Denver to comply." He says the restaurant continues to average about one wheelchair-using patron a month—the same as before the case: "Nor have we ever once had a customer's wheels touch the ramp to the upper platform."

Mike Auberger thinks Taylor has an attitude problem. Auberger is a member of Atlantis/ADAPT, the local activist group who set up tables on the sidewalk in front of the Barolo, eating cans of Chef-Boy-R-Dee and drinking cheap wine with a sign displayed: "Accessible Seating."

"Taylor created his own problems," Auberger says. "It's real clear the contractor and owner violated city construction laws. You should expect them to come down hard. They could have made him take everything out.

"We don't appear to public opinion to be reasonable, but we are," Auberger says. He and Robin Stephens, and four of their ADAPT colleagues, met me in March in their offices. Despite the phony egalitarianism implicit in their wanting all to meet me together, Auberger, the only one with a conventionally clear voice, did most of the speaking. Stephens, whom Auberger credits as the main organizer of their 23 ADA lawsuits (so far) against Denver businesses, talked a little.

They aimed their first wave of suits at the Cherry Creek district where Barolo is located, "a real chi-chi area where all the watches cost $5,000," Auberger says. Their campaigns usually start by writing letters, followed by demonstrations. Only then do they resort to lawsuits.

"It's a hell of a lot easier to do it in a meeting. It takes a hell of a lot of energy to do the demonstrations, to do the lawsuits. We'll do that if that's what it takes. But my preference is, let's do it nice and resolve it as amicably as possible."

After Cherry Creek—where only the Barolo case garnered DOJ involvement—Atlantis/ADAPT has its eyes on lower downtown Denver, an area with mostly older buildings. Another wave of demonstrations and possible lawsuits is building up to hit Denver, and ADAPT has affiliate organizations in 33 other cities. With the ADA's provisions for private-party suits, these groups have a direct financial incentive—as well as ideological motivations—to launch such campaigns.

Private citizens aren't the only ones bedeviled by strict application of the ADA. The Washington (D.C.) Metropolitan Area Transit Authority has already spent almost $40 million on ADA reform, says spokeswoman Patricia Lambe. So it's not just a matter of money that made them rebel against a particular ADA requirement that they found irrelevant and completely unnecessary. "It's principle and science," Lambe insists, explaining D.C. Metro's refusal to change the platform edging in all their train stations to a raised surface of rubber bumps—allegedly to prevent blind riders from falling in front of trains.

The D.C. Metro system commissioned a study that found the current platform edging perfectly suitable to prevent that tragedy—which occurs far less frequently than sighted people falling. The rare falls by the blind that have occurred were caused by things other than the difference in surfacing between the edge and the main platform anyway, Lambe insists. "Where is the data saying this was ever a problem?"

Besides, she says, the ADA was meant to be a civil rights law, not a safety regulation. The D.C. Metro system told the Federal Transit Administration it intends to keep its current platform edging. Instead, under an agreement with the FTA, the Metro will intensify the flashing lights at the platform edge.

For many individuals and municipal authorities, though, cost *is* the issue. The National Association of Counties estimates the ADA will cost counties $2.8 billion to comply from 1994–98. The U.S. Conference of Mayors sees cities spending $2.2 billion over the same period.

Consider sidewalk curb cuts, which provide mini-ramps for

wheelchair users on city sidewalks. Various municipalities estimate the cost of installing the cuts at $500 to $4,000 each—and most cities have a lot of curbs. The ADA's curb-cut requirement kicks in any time work is done on roads or sidewalks. Philadelphia recently lost a suit in which it argued that merely resurfacing the street in front of the sidewalk shouldn't mean having to replace the curbs. Now just filling potholes can trigger ADA-related sidewalk overhauls.

Many cities, like many businesses, are simply flouting the law. The official deadline for ADA compliance for local governments was January 26, and no one is pretending this means anyone is actually in compliance. Every town and county in the nation is a lawsuit away from serious trouble.

Still, ADA experts at municipal government associations emphasize that good-faith efforts with the disabled community can insulate cities from suits. Governments can avoid expensive structural retrofitting by emphasizing "program compliance" instead of "structural compliance": holding meetings downstairs instead of upstairs, for instance.

John Storm and Roman Yasiejko of the Duchess County (New York) Department of Health are the Stuart Smalleys of governmental ADA compliance—they've done well, they feel well, and by gosh, ADA compliance is a snap if you approach it with the right attitude. They insist that municipalities *can* comply. They did, not by hiring expensive outside consultants to examine their 800,000 square feet of office space but by putting together a complicated structure of city-employee teams. In the end, Storm and Yasiejko calculate that the actual cost of bringing the county into almost 99 percent ADA compliance was only $330,000, substantially less than their first estimate of $800,000, which included money for outside consultants.

But they get this figure by assuming the labor of all the employees was absolutely costless. Yes, the project required them to form multi-level teams to examine every square inch of their office property and come up with ways to bring it up to the standards of a complex law that none of them had any previous experience with. But, says Yasiejko sincerely, those employees weren't officially relieved of any of their other duties, so the project cost nothing extra.

Duchess County also found savings by foisting compliance expenses onto the private landlords from whom they lease space. Under the law, says Yasiejko, "the private sector has less flexibility with compliance than the public. So will the county pay, or the landlord? There's a very competitive market for buyers of leased spaces, so in most cases the landlords bore the cost."

This misplaced sense of costlessness—ignoring expenses sloughed off on others, assuming no opportunity cost to lost time (or space)—often contaminates estimates of the low cost of ADA compliance. For example, a handicapped space in a small strip-mall parking lot could be considered as cheap as spray-painting the silhouette of someone in a wheelchair—or as expensive as lost business when people leave because they can't find a parking space.

And sure, some modifications, like putting desks up on cinderblocks to make room for wheelchairs—an example beloved by ADA devotees—are cheap and easy. But at least in that case, the modification is in response to an actual existing problem—a real employee in a wheelchair.

Consider a more-typical "public accommodation" modification triggered by construction work in the offices of the Reason Foundation, the nonprofit think tank that publishes REASON. Although the modern office building in which the foundation is located complies with most ADA requirements—from wide doors to Braille elevator buttons—most suites have conventional noisy fire alarms. So when the foundation spent $1,100 to install a couple of half-walls dividing offices, it was required to fork over another $5,000 (to a different contractor) for strobe-light fire alarms for the deaf. The foundation has no deaf employees, and the chance that a deaf visitor would be around during a fire and not have any hearing person warn them is infinitesimal. But the law is the law. And $5,000 is a lot of money.

The estimates of the ADA's costs are almost certainly skewed downward, perhaps unintentionally, by advocates. The Job Accommodation Network, a government-funded disability consulting service at West Virginia University, is often cited for its figures emphasizing the very low costs of accommodating the disabled in the workplace. Their data, based on surveys (with a 45 percent response rate) of people who call them seeking advice, indicate that 68 percent of ADA accommodations cost less than $500, and that only 22 percent cost more than $1,000. The median cost, calculates the network, is $200 per accommo-

Atlantis/ADAPT has its eyes on lower downtown Denver, an area with mostly older buildings, according to Mike Auberger (left) and Robin Stephens (right). Another wave of demonstrations and possible lawsuits is building up to hit Denver, and ADAPT has affiliate organizations in 33 other cities. With the ADA's provisions for private-party suits, these groups have a direct financial incentive—as well as ideological motivations—to launch such campaigns.

dation; the average, $992.

Some lawyers guess that those figures are in the ballpark. But Wendy Lechner of the National Federation of Independent Businesses calls them "complete hooey." She says, "There is no meaningful average. We know that small business owners are not being surveyed to find out their costs. It's all anecdotal evidence from a small amount of respondents."

One reason the ADA might not be showing its eventual full costs is simple, yet not one a business owner would generally admit out loud. The ADA costs nothing if you do nothing about it, merely crossing your fingers and hoping not to get sued.

Hamilton Brown, an ADA consultant for the National Association of Towns and Townships, estimates that only about half of his clients have done anything at all about the ADA. And even though his clients include only small, mostly rural governments, they still probably have more money to play with than the Texas small businessmen with whom David Pinkus of Texas Small Business United works.

"The typical small businessman won't read any of these hundreds of pages of federal regulations," Pinkus says. "They just want a small checklist that everyone can agree on: If you do this, we won't sue you. But the government doesn't want to give anyone the impression they won't ever be sued. So businessmen think, I might as well wait to get sued and then do what they ask me to do."

Who Are the Disabled?

Richard Kubach's, Blair Taylor's, the D.C. Metro's, and the Reason Foundation's cases are unusual in a counterintuitive way: They involve the wheelchair-bound, the blind, and the deaf. Some might expect—and the debates over the law implied—that such disabled people would be among the ADA's main beneficiaries.

The wheelchair-bound aren't the biggest users of the ADA. Of the nearly 40,000 complaints the EEOC received by the end of 1994, most fell into categories for which the meaning and seriousness of the "disability" are far more nebulous—and thus ripe for more complicated legal contentiousness—such as back impairments (19.5 percent), neurological impairments (12.1 percent), and emotional/psychiatric impairments (11.4 percent).

Certainly the most difficult requirements of the ADA involve the wheelchair-bound, even though they represent a minuscule portion of the "49 million disabled" figure bandied about by activists. Fewer than 2 percent of the disabled are wheelchair-bound, about 529,000 people between the ages of 15 and 64. Yet it is the requirements for the proper width of "handicapped" bathrooms (though the wheelchair-bound are the only handicapped who need them) that stymie the introduction of clean, modern public toilets in cities like New York and San Francisco. And it is these requirements that are causing one Los Angeles plumber to be denied payment for his work on a municipal convention center, because some of the toilets are an eighth of an inch too close to the wall.

As the members of Atlantis/ADAPT in Denver made clear to me, life can be painful and difficult for the wheelchair-bound when no one allows for their problems in navigating streets, public transit, or the insides of stores. That's what the ADA is all about, they say, not the petty complaints of business owners.

But the wheelchair-bound aren't the biggest users of the ADA. Of the nearly 40,000 complaints the EEOC (which handles employment complaints under the law) received by the end of 1994, only 7.3 percent had to do with people disabled in their extremities, which would cover wheelchair users, as well as people with orthopedic problems, missing digits, and the like. The blind and the deaf together accounted for only 6 percent of complaints. A plurality fell into categories for which the meaning and seriousness of the "disability" are far more nebulous—and thus ripe for more complicated legal contentiousness—such as back impairments (19.5 percent), neurological impairments (12.1 percent), and emotional/psychiatric impairments (11.4 percent).

"The ones that go to court are usually not the good cases, the ones involving obvious disabilities," says Nancy Noall, a Ohio ADA lawyer. "Legal problems start when the claimed disability is not something an employer or typical person considers a handicap....Sometimes there are just ones who are faking it. Back injuries with no medical evidence, where they won't accept any accommodation except getting a helper to do the entire job."

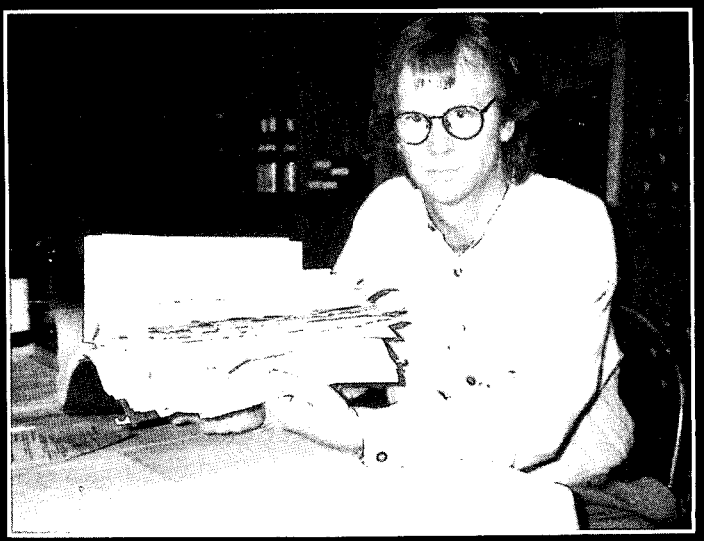
The heaviest burden isn't making reasonable physical accommodations, says Austin, Texas, attorney Dewey Poteet. It's handling employees with kid gloves: "Like if an employee has missed on average 100 days a year over the last three years, for nothing specific, but much of it for various doctor visits. That should be a straightforward issue—attendance—but there are medical issues involved, and therefore ADA implications."

Questions of mental illness can turn open-and-shut cases into insoluble dilemmas. Labor attorney Frank Cronin of Los Angeles tells of a secretary who couldn't remember assignments she had been given. Because of her memory problems, she was getting frustrated and in disputes with her boss, who needed a secretary who could handle a fast-paced, high-pressure office environment.

She asserted that her memory loss came from taking antidepressants. If she took too much, she suffered memory loss; too little, depression, which manifested itself in weeping and fights around the office. Her boss was ADA-savvy enough to know that

depression equals disability. So rather than fire her, he took away many of her tasks but kept her at the same pay. Hiring someone else to do the jobs she used to do cost the employer $40,000.

She then claimed that this discrimination in job assignments caused her to become more depressed and to start missing too many days. She was eventually fired, and fighting off her lawyer cost another $20,000. "This is a typical pattern in psychological injury cases," says Cronin. "It's impossible to accommodate it."



"The federal government flew two attorneys for every meeting, gave them hotels, rental cars, meals. They came in from D.C. seven times," says Taylor. "We figure at least $250,000 was spent to force a restaurant in Denver to comply." He says the restaurant continues to average about one wheelchair-using patron a month—the same as before the case. Here he displays some of the paperwork generated by the case.

Another Cronin case involves a part-time insurance clerk. Very bouncy, colorful dresser, always telling interesting stories, married 20 years, Cronin relates. Then she had recovered memory therapy that "discovered" sexual abuse from her father as a child. After this therapy, she became miserable, depressed, and cut off from her family. She became obsessed, started wearing black, and her depression led to absenteeism. After six to eight months of that, she was fired. And she sued.

"The lawsuit is still pending. Because the legal standards are so unclear, we won't know until the jury tells us, How do you reasonably accommodate someone who is so depressed they are always thinking about their problems at work? Is her depression enough to be qualified as a disability? None of these questions can be answered without very expensive legal proceedings with tons of expert witnesses," says Cronin. "I'm getting depressed just thinking about this."

Do Do-Gooder Laws Do Good?

The feel-goodism of the ADA does not come free, or even cheap. All indications are that the ADA simply cannot be obeyed in its entirety. Which means every business, every public building, every government in the country is living under the shadow of a potentially exhausting and financially devastating lawsuit.

And for what? Like research into ADA's macro costs, research into its benefits has been thin. But the data that exist are not encouraging.

The National Organization on Disabilities conducted a survey on the status of the disabled in America in 1986 and again last year. The big numbers are numbing: 49 million disabled, more than one of six people of working age (defined as between 15 and 64). Fifteen percent, this survey says, have back problems as their only disability.

The specific figures are more striking. When Congress was considering the ADA, its advocates emphasized the benefits of making the disabled taxpayers, instead of tax consumers, by giving them freer access to jobs. But the ADA has had no appreciable effect on getting the disabled into the workforce.

In fact, the percentage of working-age disabled actually working went down from the 1986 survey—31 percent were working in 1994, compared with 33 percent in 1986. A similar study done by Vocational Econometrics Inc. found that the percentage of disabled males working or actively looking for work dropped to 30 percent in 1993 from 33 percent in 1992.

Nor has the ADA shown any signs of stanching the flow of federal disability relief money. Total benefit payments from the Social Security's disability insurance trust fund were $40.4 billion for fiscal 1995, up substantially from the $30.4 billion in 1992, when the ADA went into effect.

The data don't prove the ADA has *not* had benefits in bringing the disabled into the workplace—perhaps without the ADA their employment rate would have been even lower. But there is certainly no evidence, despite all the costs, that the ADA has helped.

George Kroloff, a spokesman for the National Organization on Disabilities, still thinks the ADA has done some—unquantifiable—good: "We're seeing the disabled presented more positively in movies, advertising, TV shows....The tenor of the nation, in some not-measurable way, is more caring than it has been in the past."

The Politics of Reform

If that's true, then perhaps draconian legal solutions to the problem of handicapped access aren't necessary, especially since there's no indication that the ADA approach has worked except to satisfy the activist groups that have claimed the scalps of the likes of Blair Taylor and Richard Kubach.

Injured war veteran Bob Dole was a key supporter of the ADA. Phil Gramm also voted for it. Both are now angling to be elected president in 1996, as leaders of a party ostensibly dedicated to easing unfunded federal mandates, chopping through the regulatory thicket, and creating an America of, in Gramm's favorite phrase, more freedom and less government. The ADA threatens all three goals.

Still, Dole staffers say that they see no reason to rethink the ADA now, and they doubt that any of his '96 opponents will at-

tempt to outflank him on the issue. Indeed, no one from either Gramm's campaign or his Senate office would comment. As one Senate staffer put it, even his great-aunt who ran a local chapter of the John Birch Society doesn't have much of a problem with the idea of handicapped access.

The principled argument against the ADA is that it violates free association. And unlike more-traditional civil rights law, it sometimes forces people to bear huge costs while doing so.

The point of race- and sex-based civil rights law was to treat everybody the same; the ADA demands treating everybody differently. The disabled are not, in civil rights terms, analogous to blacks or women. It's one thing to say you must let into your restaurant, or hire, someone who in all practical aspects is just like any other customer or employee. It's another matter entirely to force you to build a ramp (instead of just giving someone a physical boost) at great expense to allow them easy access. And it is even more extreme to require that businesses allow employees to keep working if their emotional disturbances make them an unproductive nuisance.

It's a bit much to expect Republican politicians to recognize such principles—or even to consider them. But it would not be too much to recognize that the vagueness and reach of the ADA make it a law that has lost its bearings.

The standards for making new buildings handicapped accessible are reasonably clear (if overly detailed and sometimes silly), but there is essentially no way for someone operating a business in an old building to know if he is obeying the law. And while the employment part of the ADA applies only to businesses with 15 or more employees, the access sections cover *every* public accommodation—and the meaning of public accommodation has been stretched to include non-physical "accommodations" such as health care plans.

Clear and precise definitions of "reasonable accommodation" and "undue burden"—such as dollar caps—are a necessary first step in ADA reform. The law ought to recognize that sometimes it makes more sense to help a person in a wheelchair up a step or two than to spend thousands of dollars on ramps. It ought to realize that if someone in a wheelchair can sit and eat in a restaurant it's not necessary to force the owner to go to heroic measures to make sure that person can sit *everywhere* in the restaurant. Congress is now considering cost-benefit analyses for future regulations; it needs to look at some in the past too.

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ADA reform any time soon is a slim possibility. Lori Eisner of Rep. DeLay's staff says, "If one freshman got fired up they could very well get enough support to make something move." But even post-Contract, no such firebrand has arisen.

Now that Congress itself is officially bound to abide by the ADA, legislative change could be an ill-considered lawsuit away. But it's doubtful that disabled activists would be foolhardy enough to risk showing Congress directly how unreasonable and expensive full compliance can be.

The courts may, however, provide some redress. Currently, as New Haven ADA lawyer Patrick Shea puts it, "The regulations don't say anything about cost-benefit analyses. You might have to spend $100,000 to accommodate someone on a job that is only worth $25,000 to you. Tough. You've been conscripted to provide opportunities."

A decision by Seventh Circuit Appeals Judge Richard Posner, in *Lori L. Vande Zande v. State of Wisconsin Department of Administration*, may be the key to ending that conscription. Posner concluded that "even if an employer is so large or wealthy...that it would not be able to plead 'undue hardship,' it would not be required to expend enormous sums in order to bring about a trivial improvement....If the nation's employers have potentially unlimited financial obligations to [all] disabled persons, the ADA will have imposed an indirect tax potentially greater than the national debt."

Instead of requiring an open-ended obligation, wrote Posner, "The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if the prima facie showing is made, the employer has an opportunity to prove that...the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."

That precedent could go a long way toward clearing up the issues in Frank Cronin's cases of depressed secretaries, and providing a clearer understanding of what the employment aspect of the law requires. (It could be applied to access issues as well.) It is a good first step, and it has the ADA activist community worried.

Sitting in the handicapped-accessible restaurant that cost him more months and more thousands of dollars and more grief than he could have imagined, Blair Taylor says, "I want to be helpful because I'm a nice person. I don't want to be forced to do something to help you to the detriment of my own well-being." ◆

Brian Doherty is assistant editor of REASON.

A broad coalition of deregulators is gearing up to reform the FDA. How far will they go?

By Rick Henderson

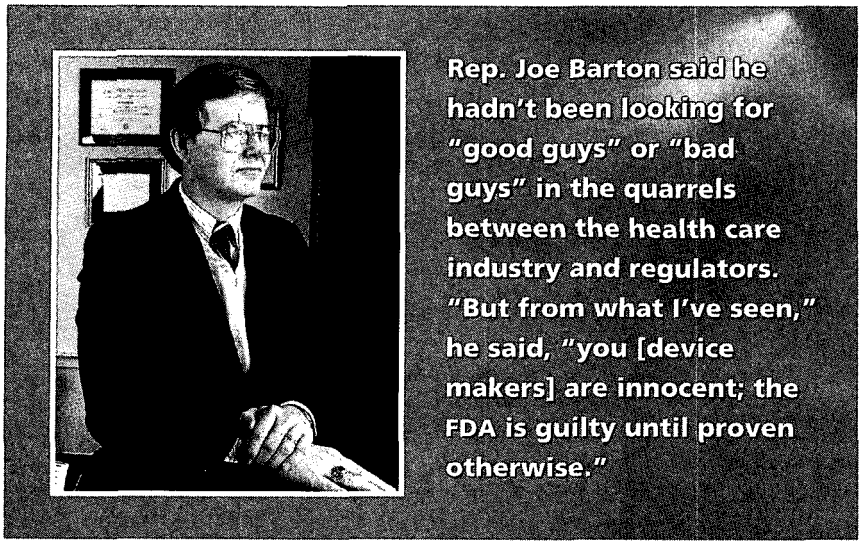
"The Food and Drug Administration has made American drugs and medical devices the envy of the world," wrote Bill Clinton in his introduction to the March National Performance Review proposal to "reinvent" the regulation of pharmaceutical products and medical devices. "And we are going to stick with the standard we have—the highest in the world."

In mid-May, Rep. Joe Barton (R-Tex.), who chairs the House oversight subcommittee that keeps tabs on the FDA, offered a slightly different perspective. As recently as March, *USA Today* had reported that Barton was "not ready to call for massive [FDA] reforms." But times change. "After four months of being objective and unbiased, I'm not impressed [with] the agency's procedures or internal attitudes," he told the annual meeting of the Medical Device Manufacturers Association on May 12. Barton said he hadn't been looking for "good guys" or "bad guys" in the quarrels between the health care industry and regulators. "But from what I've seen," he said, "you [device makers] are innocent; the FDA is guilty until proven otherwise."

To an extent that was inconceivable before last November's elections, Barton's view of what he calls the "Foot Dragging and Alibi" agency is becoming the consensus on Capitol Hill. Even Democrats who have staunchly defended the FDA and its aggressive commissioner, David Kessler, are proposing to loosen the agency's regulatory stranglehold on the food, drug, and medical-device industries.

With the exception of a few agency insiders and Naderite holdouts, policy makers across the political spectrum plan to push the FDA to change its focus. Reformers want the agency to concentrate on more rapidly getting drugs and devices to doctors and patients rather than delaying, prosecuting, or otherwise scrutinizing the medical industry into bankruptcy.

But those who would remake the FDA face daunting challenges. The general public doesn't perceive a crisis in food, drug, and device approval, so there's no populist groundswell for systemic changes. Restructuring the FDA will require more than tweaking a few rules, because the agency operates separate divisions and issues unique regulations to control the food, drug, biotech, and device industries. And the industries under the FDA's thumb don't all support identical reforms: Food and additive suppliers are most concerned about labeling requirements; device makers, who weren't regulated by the FDA before 1976, would ideally remake the agency into a certifier, rather than an approver of products; and pharmaceutical companies would only tinker at the margins of reform—they've spent the past 30 years learning to game the system and gaining benefits from barriers the agency imposes on potential competitors.



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Stories on the FDA's regulatory overkill abound. For instance, the FDA's Center for Devices and Radiological Health takes more than three times longer to approve a Class III or "substantial risk" medical device (such life-saving products as heart valves or CAT scanners) than do the agency's counterparts in Europe. As a result, U.S. device manufacturers are moving their product trials elsewhere. In the past 10 months, reports a survey published in June by the Health Industry Manufacturing Association, 50 percent of the more than 500 device makers surveyed had moved some clinical trials of new medical devices overseas; 56 percent refused to test new devices on Medicare patients; and 75 percent planned to move their trials to Europe.

Pharmaceuticals face similar delays. The average time it takes a drug company to develop and gain approval for a new drug has almost doubled over the past 30 years—from 8.1 years in the 1960s to 14.5 years today. And, reports the Pharmaceutical Research and Manufacturers of America (PhRMA), more than 60 percent of the new drugs and biologics (genetically engineered pharmaceuticals) approved here in the 1990s were first approved in another country.

The food industry is also eager to alleviate regulatory holdups. The Grocery Manufacturers Association says on average it takes the FDA more than five years to approve new food ingredients. And some ingredients have been kept off the shelves much longer; more than one-third of the food-additive petitions now pending at the FDA were filed between 1971 and 1989.

The American Enterprise Institute's Jack Calfee, former chief economist at the Federal Trade Commission, points out that food, drug, and device companies have little choice but to put up with such regulatory abuse. The FDA controls what a company can make; when those products can enter the market; how it manufactures those products; where it can sell them; where and under what circumstances it can promote what it makes; and even what its advertising and promotional literature can say.

Calfee argues that the only way to restrain the FDA's regulatory juggernaut is to break up the agency, placing food, drug, device, and advertising regulations into separate jurisdictions. Jeff Pierce, regulatory analyst for Citizens for a Sound Economy, agrees that serious regulatory reforms must get beyond finger-pointing and name-calling. Free marketeers and patient advocates have blamed FDA chief Kessler's headline-grabbing enforcement proceedings for causing much of the recent food, drug, and device delays. But, Pierce says, until the agency's power is reduced, even if a saint ran the FDA, unnecessary delays would continue.

Until this year, industry cries for congressional help had fallen mostly on deaf ears. The House subcommittee on health was chaired by Rep. Henry Waxman (D-Calif.), who would gleefully drag Kessler and his predecessors before the committee's klieg lights when an FDA-approved drug or device was recalled because it was less safe or effective than originally touted. Such scrutiny guaranteed front-page coverage for Waxman and his Naderite allies and gave the FDA big incentives to approve as few new drugs and devices as possible. Sam Kazman, general counsel for the Competitive Enterprise Institute, points out that "the easiest way to have zero recalls is to approve zero drugs and devices."

Since the November election, however, the mood on Capitol Hill has clearly changed. The rhetorical shift was best signaled at an April 6 hearing before the Senate Labor and Human Resources Committee. Sen. Barbara Mikulski (D–Md.), hardly a raving deregulator, upbraided Kessler for his agency's recalcitrance. "We need a sense of urgency, we need a commitment, we need a passion for change," she chided. "And if not, I think the Congress is going to roll right over you."

Congress started rolling a month later when, on May 11, the $16 billion 1995 rescissions package passed by the House and

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Senate killed funding for the agency's new home, an $810 million, 356 acre "campus" in rural Maryland. Citizens for a Sound Economy led the opposition to the new facilities, placing ads in D.C.-area publications comparing the campus to the Taj Mahal; having its chairman, former White House Counsel C. Boyden Gray, testify against the campus before congressional appropriators; and mobilizing its 250,000 members to contact legislators. The CSE-led opposition worked: The report issued with the rescissions package clearly stated that Congress wouldn't appropriate money for new FDA facilities before "any future FDA restructuring" took place.

Plans to restructure the agency are now circulating on Capitol Hill. The White House proposal would remove a few regulatory barriers and develop a "pilot" program to consider letting private parties review some low-risk medical devices. As with the rest of the National Performance Review, the White House wants to make the FDA more efficient, not necessarily less intrusive. Despite public endorsements of the plan by businesses, health care providers, and patient groups, in private few take this proposal seriously.

Meanwhile, Rep. Ron Wyden (D-Ore.), the self-described consumer advocate who five years ago used congressional hearings to call for tougher regulation of the $33 billion diet industry, has become a born-again deregulator. In early April, Wyden, the ranking Democrat on Barton's oversight subcommittee, outlined his proposals in an eight-page, single-spaced letter to President Clinton. Wyden decried the "bureaucratic structure of the FDA....Computers, biotechnology, and other innovations are producing better healthcare products which we can't allow to be stifled by a lethargic, slow-moving or insensitive approval process."

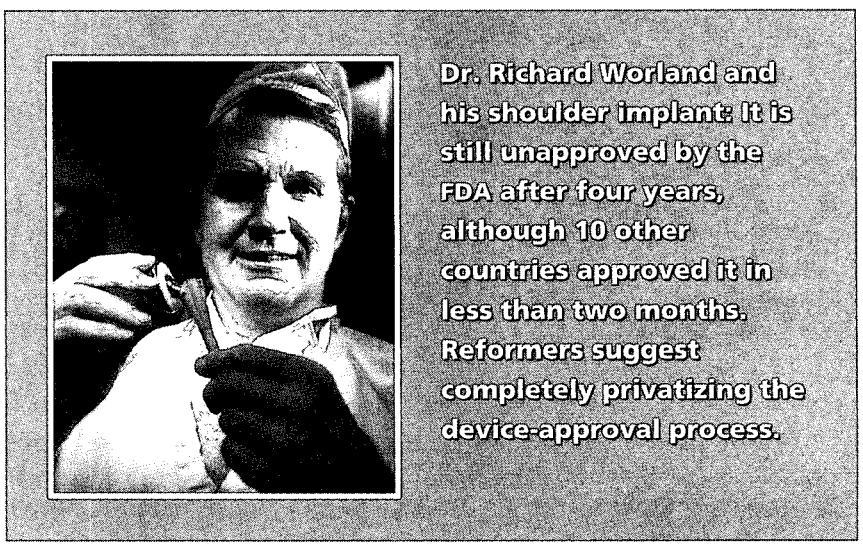
Among other reforms, Wyden would let outside reviewers approve low-risk devices, eliminate barriers that prohibit U.S. manufacturers from exporting devices that are approved for use in other countries but not yet approved here, and allow "breakthrough" drugs to be approved after one set of clinical trials, cutting approval times for those drugs by years rather than months. (Rumor has it that Wyden's newly found free market principles also coincide with his possible plans to challenge incumbent Republican Sen. Mark Hatfield next year.) Several trade-association representatives told me that, before the election, they would have been delighted to see the Wyden plan enacted. But they believe much more is now possible.

The most-sweeping FDA changes will probably come from the Medical Innovation Project, a collection of free market think tanks, academics, and trade associations assembled by the Progress & Freedom Foundation, a think tank that acts as House Speaker Newt Gingrich's brain trust. PFF Senior Fellow Tom Lenard, one of the project's leaders, argues that the FDA must eventually be replaced as a "politicized, risk-averse government-owned monopoly."

Lenard argues that developing public support for removing the agency's monopoly powers will take several years rather than a few months. "The public has to be assured that none of these changes will involve a dimunition of the standards under which drugs and devices are judged," he says. In July, the Medical Innovation Project plans to release a legislative agenda for private alternatives to many FDA functions.

In between the administration/Wyden proposals and those from the Medical Innovation Project are proposals the trade associations are coming up with themselves. Industry groups believe they can get substantive changes from this Congress, and they aren't willing to wait years for reforms to take effect. Yet there are striking differences over how far the different types of regulated firms will go. Brian Folkerts, a lobbyist for the National Food Processors Association, admits that "drugs and devices get most of the agency's attention, because the failure to approve them can lead to needless deaths." Even so, he says, the agency's "failure to act hurts our members' ability to provide healthy additives and ingredients." His group will prod the FDA to speed up approval of new items and push Congress to allow private groups to clear health claims made by food makers.

Pharmaceutical companies certainly have more regulatory hoops to jump through than food makers, so you might think they'd seek more thoroughgoing reforms. But they have benefited from the FDA's regulatory maze, which gives established drug companies a competitive advantage by erecting barriers to those firms that lack the expertise or patience to wait a dozen years to bring a new drug to market. "Successful drug companies can handle the approval process," one industry observer says.



Dr. Richard Worland and his shoulder implant: It is still unapproved by the FDA after four years, although 10 other countries approved it in less than two months. Reformers suggest completely privatizing the device-approval process.

Drug firms would never advocate substantially loosening the FDA's bottleneck on approvals, the observer says, "because the current system lets [drug companies] earn near-monopoly profits."

PhRMA, the drug-makers' trade association, has indeed suggested ways to speed up drug approval—most notably by merging the separate FDA divisions that regulate drugs and biologics and requiring the agency to let independent reviewers gain FDA certification to conduct some drug-approval tests. But PhRMA

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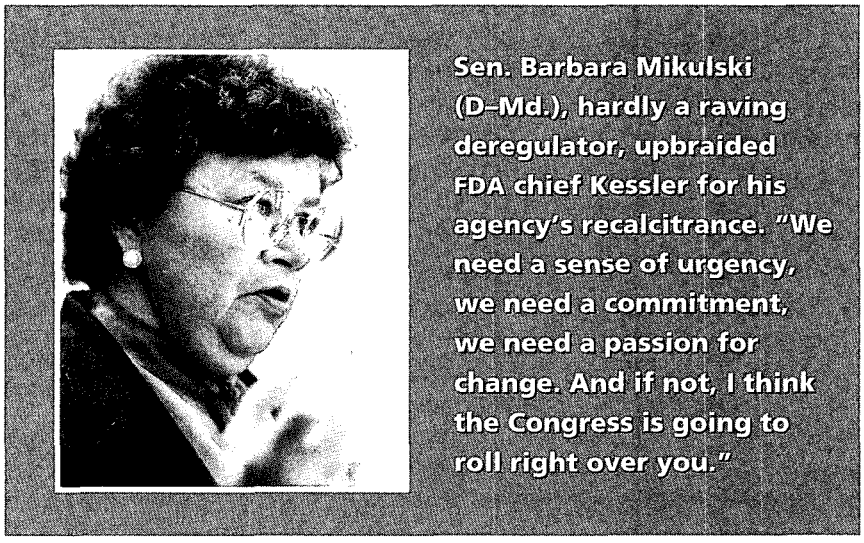
would let the agency maintain its monopoly over approvals.

Device makers, by contrast, are less patient and much more willing to get in the FDA's face. Before Congress passed the Medical Device Amendments of 1976, the device industry hadn't been regulated at all, and until the Safe Medical Devices Act passed in 1990, the FDA's Center for Devices and Radiological Health paid scant attention to low- and medium-risk devices.

Before the 1990 device act passed, says Tommy Thompson, president of Quest Medical and chairman of the Medical Device Manufacturers Association (MDMA), the FDA could recall an unsafe device only after it was placed on the market; the new law forced device makers to submit their products for approval before selling them. "Although most changes in the SMDA didn't deal with product approval," says Thompson, "the FDA acted as if the SMDA dramatically expanded their authority."

Impatient device makers will attract a sympathetic hearing from congressional deregulators, including moderates and liberals, because they appeal to a motive everyone understands: self-interest. As many as 8,000 device manufacturers are scattered throughout the United States (and are thus located in many congressional districts); they employ 270,000 persons, comparable to the number who work in the semiconductor industry; and companies with fewer than 20 employees generate 64 percent of the industry's sales. As long as the preservation of "small businesses" and "high-tech" jobs remains politically sacrosanct, elected officials will scramble to mow down regulations that close down (or force overseas) cutting-edge companies in their districts.

It appears that the feisty two-and-a-half-year-old MDMA will get a more sympathetic hearing from Congress than the 700-member Health Industry Manufacturers Association (HIMA), which represents the industry's bigger, more-established firms. As trade associations are perceived, HIMA may be analogous to the U.S. Chamber of Commerce—solid corporate citizens who don't want to roil the political waters. MDMA is more like the National Federation of Independent Business, or even the Small Business Survival Committee—impatient and eager to mix it up with regulators if confrontation is needed to get products on the market. The 104th Congress, especially the pugnacious House, seems to revel in confrontation.



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Both national associations agree on several reforms. They would eliminate controls that prohibit U.S. device makers from exporting devices that are approved in other countries but not here. They would allow all Class I, low-risk devices to reach the marketplace without the approval of the FDA, letting products such as toothpaste and contact lenses enter the market without first having to navigate the FDA bureaucracy. They would push Congress to develop a mission statement for the FDA and its device center, clarifying that the agency's purpose is to keep unsafe devices off the market while making new devices available as quickly as possible.

And along with the White House, HIMA and the MDMA want to eliminate the FDA's "Reference List." Under this internal policy, as described by several CEOs at the MDMA meeting in May, the agency often prevents a device company from getting approval for any of its new products if, in the past, the company has in any way violated manufacturing protocols. Once a device maker gets on the list, it tends to stay there, even after it resolves its problems and even if it develops completely different products. The administration promises that the agency will deny approval only to specific devices that don't meet agency standards, and not penalize those companies if they have other products in the pipeline.

Beyond these areas of consensus, HIMA and the MDMA take substantially different approaches on both the strategy and tactics of other FDA reforms. One contentious issue is "third party" approval of devices. Both groups oppose an administration plan that would impose "user fees" on companies that want to speed up the approval of new devices. HIMA would streamline the agency's device center, limiting its functions to reviewing devices and enforcing regulations; it would allow outside organizations to apply for FDA certification to review new devices. The MDMA, by contrast, would relocate the center as an independent part of the Public Health Service and completely privatize device approvals using independent outside reviewers.

In addition, both groups oppose the requirement that causes the biggest delay in device approvals: the FDA's demand that devices be regulated under the same "safety" and "effectiveness" standards as drugs. But the MDMA proposes changing the definition of "effectiveness" to encompass no more than truth in labeling. Under today's FDA standards, a device is considered to be "effective" only when, in the agency's judgment, it works as well as or better than other products on the market; the MDMA argues instead that a device is "effective" when it does what it says it will do. As long as devices are safe, the MDMA believes that doctors and patients, rather than the FDA, should decide which ones to use.

The MDMA spelled out its reforms in a 22-page blueprint pub-

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lished by the National Medical Device Coalition, an ad-hoc group of 10 national and regional device associations, representing large and small companies. The coalition shares one goal: to completely redesign the FDA's device center. The members include manufacturers of in-vitro diagnostics, dental implants, and contact lenses; the American Electronics Association; and the MDMA. Unlike HIMA, which hasn't reached far beyond its members to promote its reforms, the device coalition is actively approaching patient-advocacy groups and physicians associations to drum up grassroots support for their legislative agenda.

The MDMA's approach appears to be working. Barton praised the blueprint at the MDMA meeting. And freshman Sen. Rod Grams (R-Minn.) chose that same gathering to announce the formation of the Senate Medical Technology Caucus, which will concentrate on FDA reforms.

To date, no one has drafted comprehensive FDA legislation. Barton will hold hearings throughout the summer, saying that Congress won't have time to concentrate on FDA reforms until the budget is passed. Bills do exist in both houses to repeal export controls, but not much more is out there yet.

Rep. Ron Wyden (D-Ore.) wants to let outside reviewers approve low-risk devices and eliminate barriers that prohibit U.S. manufacturers from exporting devices that are approved for use in other countries but not yet approved here.

Meanwhile, medical manufacturers have to hope the FDA will sway with the political breezes. Industry and advocacy groups are pushing devices the FDA hasn't yet approved as "poster children" for reform: the Ambu CardioPump, a CPR device that is available in almost every country but the United States; the Canadian-produced Inventive Products Sensor Pad, a 9-year-old breast-cancer diagnostic device which consists of two sheets of plastic with silicone inside that greatly enhances the ability of women to detect lumps in their breasts; and the "bipolar" shoulder implant, developed by Richmond orthopedic surgeon Richard Worland in 1990. Ten countries approved Worland's implant in less than two months, but the FDA still hasn't approved it here, four years after Worland applied for approval. Ironically, Worland suffers from rheumatoid arthritis, needs a shoulder replacement, and may have to go to England to get his own device implanted.

And then there's Mark White, one of 50 device-making CEOs the MDMA flew into Washington for meetings with legislators before the trade group's annual meeting. White, an emergency-room physician in Indianapolis, had designed and produced a quick, safe, one-handed method for physicians to recap needles and remove them from syringes after they've injected their patients—a real help to a harried doctor. White began producing his "cap cards," which are about as big as a credit card and twice as thick, after complying with Occupational Safety and Health Administration guidelines established in 1988. While not a breakthrough life-saving device like, say, a heart valve, the cap card quickly found a market. Drug companies and medical suppliers started ordering the cards in bulk, using them as an advertising vehicle, and giving them to physicians.

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Glaxo Pharmaceutical was ready to place an order for the cards. First, however, it asked to see a copy of White's "510(k)," the approval form the FDA requires before a medical device can be sold. White had sold cap cards before and considered them safety devices subject to OSHA regulations, not medical devices under the purview of the FDA. He had never submitted a 510(k) before, and says one of his customers told him to forget about the potential Glaxo account—the hassle of dealing with the FDA would cost far more than he would receive from the pharmaceutical giant.

"I should have listened to him," White says. Instead, in July 1993 he submitted a 510(k) to the agency. And that's when Mark White's troubles began.

White says his cap card should be "what you'd consider a Class I no-brainer"—a device that, like a tongue depressor or bed pan, poses no threat to the health of the patient or doctor if used as intended. But the cap card is used to recap needles, and an inadvertent needle stick could transmit hepatitis or the AIDS virus. The FDA thus ruled the cap card a Class III device, whose use is potentially as life-threatening or life-sustaining as an artificial lung or a dialysis machine.

"They turned my 510(k) into a full-blown approval process," White says. Even though the FDA is supposed to approve devices within 90 days of the submission of an adequate 510(k), 22 months from the time he submitted his application, White still hasn't gotten approval.

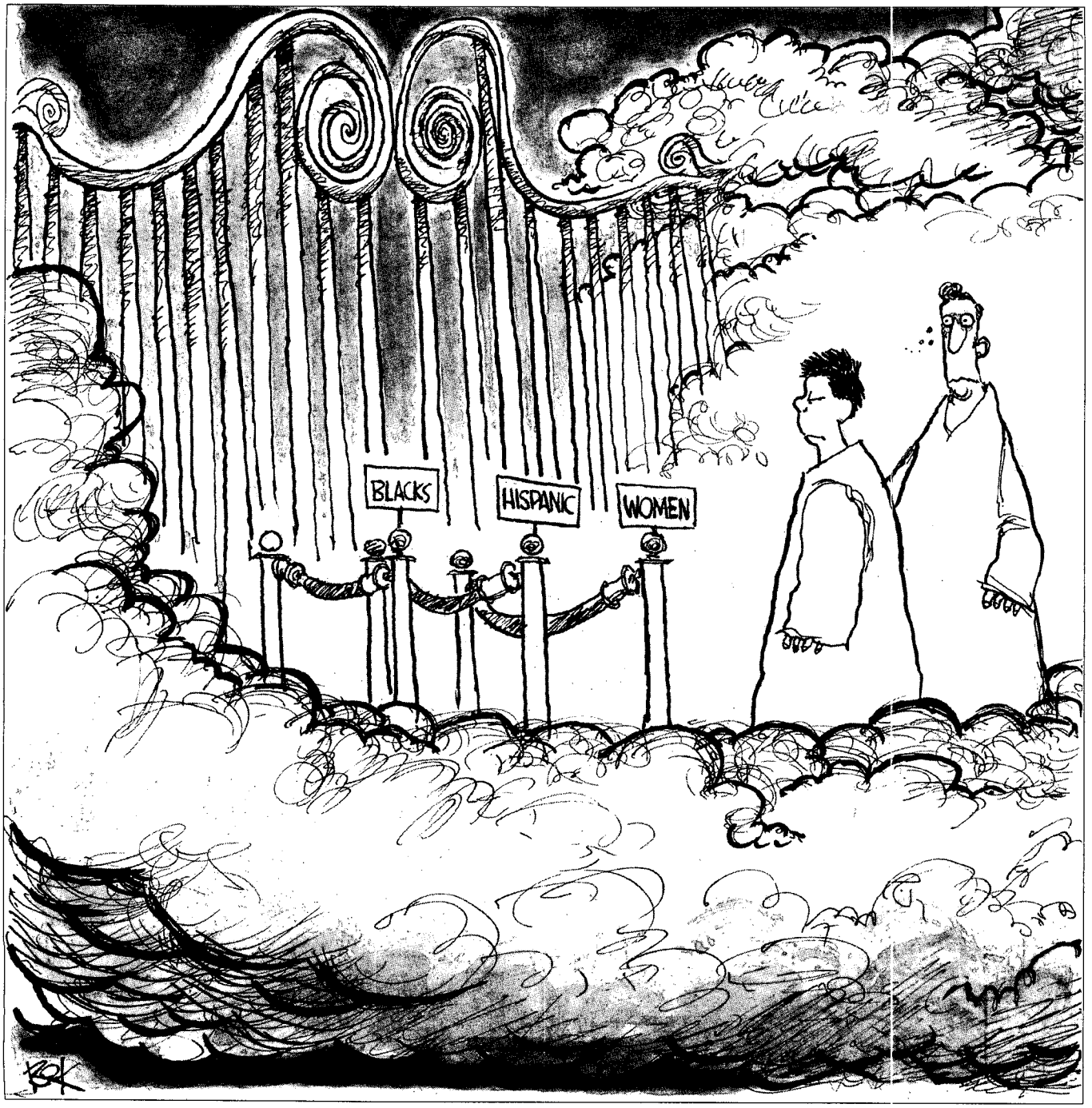
After spending more than $30,000 in a tug-of-war with FDA reviewers, White came to Washington for the MDMA meeting. Bruce Burlington, head of the agency's device center, had just addressed the group and told them how his agency was becoming more flexible and cooperative. White met Burlington in the hall, and showed him the cap card.

"Dr. Burlington told me, 'This is pretty neat,'" White says. "I asked him why his center considered it a Class III device. He didn't look too happy then." ◆

Rick Henderson (DCReason@aol.com) is Washington editor of REASON.

RACE & THE NUMBERS RACKET

The future of affirmative action may depend on a California ballot initiative—and the initiative's fate may depend on numbers the state's universities would rather not release.



CHIP BOK

By Charles Oliver

In more than two decades of public life, former California Assembly Speaker Willie Brown has established a strong public image: dapper, cool and smiling, unflappable. But there he was one day in February, pounding on a podium, angrily denouncing Golden State voters as people who are "narrow-minded in many cases, who are only interested in just their little sphere." The San Francisco Democrat, arguably the most powerful figure in Sacramento for over a decade, told the reporters he had assembled that "everybody in here has been the beneficiary of preferential treatment at my expense—at every level of your lives, at every level of your lives."

Brown's anger had been set off by the California Civil Rights Initiative, an amendment to the state constitution that may appear on next year's ballot. Brown denounced the initiative as "totally phony" and "totally and completely a racist move." His charges have been echoed by other opponents of the measure. The measure's sponsors, on the other hand, say it will simply end the quotas that pervade the state's employment, education, and contracting programs and will restore the vision of a colorblind society that motivated the early civil rights movement.

As of this writing, the first of the 650,000 signatures needed to place the CCRI on the 1996 ballot hasn't even been collected, and the initiative campaign is still seriously underfunded. But already the measure has become perhaps the most controversial ballot initiative in California history, and it has sparked a national debate on affirmative action that may affect next year's presidential election. This battle has seemingly emerged out of nowhere. If the early rounds in California are any indication, the fight will be hot and bitter.

But despite the harsh rhetoric, the battle may ultimately turn on interpretation of the numbers on government hiring and education. And those numbers suggest strongly that affirmative action programs, especially in the state universities' professional schools, have promoted less qualified members of favored ethnic groups to the particular detriment of Asians and, to a lesser extent, of whites.

The text of the CCRI seems simple enough: "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting." The initiative goes on to exempt affirmative action mandated by federal law or by existing court orders or consent decrees. Nor would it affect private-sector affirmative action programs.

Early polls show that the CCRI enjoys strong support among California's electorate. A statewide survey released by the Field Institute in March showed registered voters backed the initiative 60 percent to 35 percent, with only 5 percent undecided. Whites supported the measure 65 percent to 29 percent. Slim majorities of blacks, Latinos, and Asians opposed the measure, but even in those ethnic groups support for the CCRI was at 40 percent or higher. Republicans backed the measure by 75 percent to 20 percent, while Democrats opposed it 51 percent to 44 percent.

The emergence of the CCRI, and its huge popularity, has taken some politicians by surprise. After all, affirmative action wasn't an issue in the 1994 elections at either the state or national level. But others say they are not shocked that so many people say they will vote to overturn affirmative action.

"Having seen the results of public-opinion surveys and polls over the last few years, I'm not surprised by the popularity of this measure," says Alan Heslop, a professor of government at Claremont McKenna College. "The polls have shown a rapidly declining satisfaction with affirmative action. This decline is most pronounced among whites and Asians, but it's there to

some extent with Hispanics, and even to a small extent among blacks."

David Bositis, senior political analyst for the Joint Center on Political and Economic Studies, concurs. "This issue has been out there for some time," he says. "Polls have shown that whites opposed affirmative action by a margin of about 75 percent to 25 percent for the last five years."

Why has this dissatisfaction with affirmative action gone unnoticed for so long? "I think that there was a real disconnect between the elites and the masses," says Frederick Lynch, a professor of government at Claremont McKenna College and author of *Invisible Victims: White Males and the Crisis of Affirmative Action*. "This dissatisfaction has been out there, but no one has been willing to acknowledge it. Affirmative action is the Bermuda Triangle of social research. Only a handful of academics have even bothered to look into the results of the programs. Even the major conservative think tanks, which publish studies on every other area of public policy, have been reluctant to take on this issue."

A number of factors, some peculiar to California, seem to have brought the issue to a head. Lynch cites the emergence of talk radio as a forum for the masses to discuss the issues important to them. He and others also say the results of last November's election propelled conservative issues in general to the top of the political agenda.

And the mere fact that California has the ballot initiative is one reason the debate on affirmative action began here. Interest groups and regular citizens alike have long used the initiative process to bypass the state legislature when it has been reluctant to address their concerns. Most famously, in 1978 Californians approved by a large margin the property-tax–cutting measure Proposition 13. This vote helped launch a nationwide round of tax cuts. Last year, Golden State voters gave a big thumbs up to Proposition 187, a measure that cut off government services to illegal immigrants. "The success of Prop. 187 prepared the way for the California Civil Rights Initiative," says Sherry Bebitch Jeffe, a senior associate at the Center for Politics and Economics at the Claremont Graduate School. "It showed that issues of class and race were open to debate."

The authors of the CCRI, two academics named Tom Wood and Glynn Custred, say that before taking on this issue they were not political. "But after spending so many years in higher education, where these preferences are so aggressive, widespread, and institutionalized, we realized something had to be done," says Wood. Though Wood and Custred say they are nonpartisan, virtually all of the politicians supporting the measure are Republicans. Even Gov. Pete Wilson, who introduced racial and gender goals and timetables for city employment and contracts when he was mayor of San Diego in the 1970s, backs the initiative.

"This issue got hijacked by the Republicans, who see it as a way to appeal to and bring to the polls a certain segment—the so-called angry white males—that was so important to their victories last fall," says Jeffe. "The measure has taken on a life quite different from what its authors assumed."

The CCRI's backers deny that it has been "hijacked" by Republicans. "We gave the Democrats a chance, and they fumbled it," says Joe Gelman, campaign director for the California Civil Rights Initiative, referring to a vote last spring in which Democrats on the state Senate Governmental Organization Committee rejected a move to place the initiative on the March 1996 ballot. In April, delegates at the California Democratic Party convention voted overwhelmingly to oppose the measure.

The rhetoric of affirmative action's defenders has already heated up. Charges of racism flow easily from their lips. At the Senate hearings on the CCRI, Democrat Assemblywoman Barbara Lee said of arguments advanced by supporters of the initiative: "The Ku Klux Klan uses the same arguments to justify their positions. They are very active in this state, and they do purport to support the rhetoric of these bills." Wood says he is "very disappointed" by the "vehement and angry" rhetoric of his opponents.

Interestingly, none of the Democrats who hold major statewide offices has actually come out against the CCRI. "Many Democrats are looking for a third way, some way to defend affirmative action without supporting the status quo," says Jeffe.

One such Democrat is Assemblyman Louis Caldera. "The authors of this initiative have clearly touched a hot-button issue," says Caldera. "You can't manipulate people into caring about the initiative unless there is already existing concern. We need to address the legitimate concerns that people have about affirmative action, but this initiative is too broad and too blunt an instrument to do that."

Some, including Wood and Custred, have suggested rebuilding affirmative action on socioeconomic grounds, giving preferential treatment to people from poor or working-class backgrounds. Supporters of current affirmative action programs oppose this notion. "Discrimination in this country is based upon race, not economic class," says Allan Parachini, public affairs director of the ACLU of Southern California. "A 16-year-old African-American male driving a car in the wrong neighborhood is likely to be stopped and harassed by the police whether he is the son of a banker or the son of a poor person."

Some Democrats, however, are talking about adding class-based categories to existing affirmative action programs or means-testing programs to keep wealthy minority

Officially, the University of California system has no racial quotas, and the universities jealously guard admissions and test-score data that might suggest otherwise. But the Board of Regents commissioned a study of what enrollment would look like if affirmative action were abolished. Black enrollment would drop by half, to less than 3 percent of the student body. White enrollment would increase by merely 5 percentage points.

Percentage of Berkeley's 1994 Freshman Class in Each Category

	Enrolled	If Admitted on Academics Alone	Factoring in Socioeconomic Status
Asian American	41.7%	51.6% to 54.7%	49.3% to 51.2%
Caucasian	29.8	34.8 to 37.3	31.8 to 37.3
Hispanic	15.3	3.0 to 6.3	5.6 to 10.0
African American	6.4	0.5 to 1.9	1.4 to 2.3
Native American	1.2	0.1 to 1.0	0.2 to 0.7
Other	5.5	5.3 to 8.6	5.8 to 7.5

Source: *Wall Street Journal*

members from benefiting. "We need to make sure that there is opportunity for whites from disadvantaged backgrounds, and we could perhaps restructure the programs to keep minorities who have had lives of privilege from taking advantage of them," says Caldera.

While this approach has the cautious support of many affirmative action defenders, others worry that any talk of reform distracts from the more important goal of preserving affirmative action and may help weaken it. "We are aware that some people who think that they are on our side say that economic considerations should be added to affirmative action programs," says Parachini, "but we just don't think that this is a problem of anywhere near the magnitude of discrimination based upon race."

Early signs are that those seeking a third way will have a difficult struggle with their allies. At first, Willie Brown supported the idea of adding economic considerations to affirmative action. But *Los Angeles Times* columnist George Skelton reported early this spring that Brown regaled some lunchtime guests with a story of how he told President Clinton, who has suggested "fine-tuning" affirmative action, "By the way, Mr. President, if you do decide to leave us on affirmative action, next time I see you on a bandstand, make sure you have a banjo rather than a sax." Brown's aides told Skelton that Brown was referring to the banjo-plucking retarded Southern boy in the movie *Deliverance*.

Ruling out reform of affirmative action, such opponents of the CCRI will try to portray the initiative as an attack on equal opportunity, not quotas. "We have to clarify that quotas are already illegal except in certain narrow cases ordered by the courts to correct proven past discrimination, and the California Civil Wrongs Initiative cannot overturn those court orders," says Joe Hicks, executive director of the Southern Christian Leadership Conference of Greater Los Angeles.

Then what will the CCRI get rid of, according to its critics? "It will eliminate any program that requires affirmative outreach to underrepresented minorities or women," says Michael Harris, a staff attorney with the San Francisco–based Lawyers Committee for Civil Rights. "Programs that require, for example, broader advertising to recruit a more diverse pool of applicants....It will also ban using race or gender as one criterion in deciding among a group of qualified individuals."

When asked why such programs are needed to ensure equal opportunity, defenders of affirmative action point to the recent federal "glass ceiling" report on women in corporate America or the small numbers of women and blacks at the top levels of California's largest companies. But whatever one thinks of those numbers, they don't seem to have much to do with the CCRI, which does not apply to private-sector affirmative action programs.

Still, if the supporters of affirmative action can successfully portray the programs as furthering equal opportunity, they will probably win the debate. Polls consistently show that a large majority of Americans oppose racial and gender preferences and quotas. But those same polls show that most people, including most whites, support the idea of equal opportunity. An April nationwide poll designed by Louis Harris for the Feminist Majority Foundation, for example, found initial support for the CCRI of 81 percent. But when people were asked if they would support the initiative if it ended programs that help women and minorities achieve equal opportunity in education and employment, support plummeted to 30 percent.

Opponents of affirmative action argue that many, probably most, such programs result in de facto quotas. Sometimes the quotas are open, they say, pointing to a California law setting a goal of giving 15 percent of state contracts to minority businesses and 5 percent to firms owned by women. But usually, argue the CCRI's backers, the preferences are hidden. They cite the state's higher-education system, particularly its medical schools, for evidence of reverse discrimination.

Officially, the University of California system has no racial quotas, and the universities jealously guard admissions and test-score data that might suggest otherwise. But the *Los Angeles Times* and other sources have reported that the Board of Regents commissioned a study of what enrollment would look like if affirmative action were abolished. According to the *Times*, if admission were based upon academic performance and economic need, black enrollment would drop by half, to less than 3 percent of the student body. Latino enrollment, now 13 percent, would drop to 11 percent. The number of Asian-American students would increase by between 15 and 25 percentage points, bringing the total at the system to between 48 percent and 58 percent, compared to the current level of 33 percent. White enrollment would increase by merely 5 percentage points.

The Wall Street Journal reports that Berkeley, probably the most competitive campus, has done its own study. If admission were based on academics alone, Asians would rise from 41.7 percent of the freshman class to between 51.6 percent and 54.7 percent. The white portion of the freshman class would increase from 29.8 percent to between 34.8 percent and 37.3 percent. Hispanic enrollment would drop from 15.3 percent to between 3 percent and 6.3 percent. Blacks would go from 6.4 percent to between 0.5 percent and 1.9 percent.

The situation isn't much different at the UC professional

schools. Admissions officers at the University of California's five medical schools deny that race plays a part in admissions. "Candidates are judged by three equally weighted criteria: academic performance and test scores, clinical or research experience, and personal characteristics and experience," says Linda Grannell, an admissions officer at the University of California at Irvine's medical school. "This last would include their potential to render medical service to underrepresented populations."

But the numbers seem to tell a different story. The University of California officially considers four groups to be the "underrepresented populations" mentioned above: blacks, Mexican Americans, Puerto Ricans, and American Indians. Members of those groups have admissions rates far above whites and other minorities at the University of California medical schools. At the Davis campus, for example, researchers Jerry and Ellen Cook found that underrepresented minorities accounted for 10.6 percent of applications but 28.9 percent of acceptances from 1991 to 1993. Asians were 34.7 percent of applicants and 27.4 percent of admittees. Non-Hispanic whites, "others," and "unknowns" were 54.6 percent of applicants and 43.7 percent of those accepted. Underrepresented minorities had an acceptance rate 3.4 times that of Asians and whites. In 1993 at Davis, American Indians had an acceptance rate 11.8 times that of Koreans, and blacks were 13.7 times more likely than Koreans to be accepted.

Race-Based Admission Standards at UCLA

Black, Latino, and Native American Indian
Percent Accepted within Each GPA and LSAT Range

GPA	LSAT				Total
	<38	38, 39, 40	41, 42, 43	>43	
>3.79	59%	83%	100%	100%	73%
3.60 to 3.79	38%	57%	86%	100%	47%
3.40 to 3.59	29%	44%	100%	60%	36%
3.20 to 3.39	28%	41%	20%	75%	31%
<3.20	7%	29%	35%	44%	10%
TOTAL	15%	39%	56%	62%	20%

Asian, White, and Other
Percent Accepted within Each GPA and LSAT Range

GPA	LSAT				Total
	<38	38, 39, 40	41, 42, 43	>43	
>3.79	1%	67%	99%	100%	63%
3.60 to 3.79	2%	40%	91%	98%	50%
3.40 to 3.59	1%	14%	64%	85%	30%
3.20 to 3.39	1%	3%	25%	62%	15%
<3.20	0%	0%	4%	17%	2%
TOTAL	1%	19%	54%	73%	25%

Source: Jerry and Ellen Cook

In an attempt to eliminate differences in background other than race, the Cooks focused on medical-school applicants from one undergraduate school, the University of California at San Diego. Between 1987 and 1993, underrepresented minorities made up 13 percent of the UC-San Diego undergraduates who applied to medical school at that campus but 32 percent of those accepted. Moreover, the average GPA and MCAT score of the affirmative action group ranked in the bottom 1 percent of the other UC-San Diego students.

In another study, the Cooks looked at 1993 applicants from the University of California, Irvine, to all UC medical schools. They found that the differences in admission rates and average GPAs and test scores between affirmative action students and non–affirmative action students were about the same as in the UC-San Diego study. But this time the Cooks had access to financial data on the applicants. They found that affirmative action students who were not classified by the schools as economically disadvantaged were admitted at four times the rate of non–affirmative action students who were classified as economically disadvantaged. (UC medical schools no longer publish general breakdowns of admissions by ethnic group, MCAT scores, and GPA, though prospective students can still get estimates of their likelihood of admission by giving officials their ethnicity, scores, and GPA over the phone.)

"The conclusion must be that race is not just one factor considered in UC medical school admissions," said Ellen Cook in her April testimony before the California Assembly's Higher Education Committee. "It is the major factor."

According to information on the 1993 freshman class at UCLA Law School, the average LSAT score for accepted whites, Asians, and "others" was 42.93. The average LSAT for blacks, Latinos, and Native Americans was 36.97. This places the average score for these minorities in the lowest 2 percent of the other students. The law school accepted 38 percent of black, Latino, and Native American applicants with GPAs between 3.60 and 3.79 and LSAT scores below 38. It accepted only 2 percent of Asians, whites, and "others" with comparable GPAs and LSAT scores. "There's no question that the UCLA Law School uses racial preferences in its admissions," says Allan J. Favish, an attorney who has studied the issue.

In the coming weeks and months, government hiring, education, and contracting numbers will be subjected to greater scrutiny than at any time in the past 30 years. When people look at these figures, will they see a system that doesn't do enough to provide equal opportunity for women and minorities, or will they see proof of bias against white men? When all is said and done, the battle will be fought with these numbers, not simply with charges of racism or reverse discrimination. ◆

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Interview with the Vamp

Why Camille Paglia hates affirmative action, defends Rush Limbaugh, and respects Ayn Rand.

Interviewed by Virginia I. Postrel

PHOTO: LARRY FORD/OUTLINE

Hurricane Camille swept into American culture five years ago with the publication of *Sexual Personae*, a learned 800-page treatise on sex, art, and literature through the ages. After two decades of rejection and obscurity, Camille Paglia was famous. Her demanding master work wasn't exactly accessible to the educated lay reader, but it became a bestseller—as have her subsequent reader-friendly essay collections *Sex, Art, and American Culture* and *Vamps & Tramps*.

The secret to her celebrity is Paglia's own persona—a blend of comedienne, scholar, controversialist, self-promoter, and performance artist. Her speeches are events, designed as much to entertain as to provoke and inform. And as she herself has remarked, the times have been friendly to comic-serious iconoclasts who capitalize on their egomania: Rush Limbaugh, Howard Stern, Ross Perot, Camille Paglia. The public is sick of pious discourse.

But not of ideas. Amid Paglia's tirades and comic turns are serious thoughts about art, scholarship, politics, and civilization itself. Some are fully developed, others mostly attitude. But they are all interesting.

Despite the detractors who deride her as a conservative antifeminist, Paglia is clearly a woman of the left—How many conservatives use "white middle-class" as a term of derision?—and an unreconstructed advocate of women's achievement and independence. She has, however, been tempered by time and experience, forced to recognize the constraints of nature and the limits of radical change.

Amid her celebrity, Paglia still teaches classes and gives exams at The University of the Arts in Philadelphia where she's a professor of humanities. Editor Virginia Postrel talked by phone with Paglia in early April.

Reason: Last weekend, feminist groups led by the National Organization for Women held a rally in Washington to protest "Violence Against Women," a category in which they included such things as rolling back affirmative action. What did you think of that?

Camille Paglia: NOW is pretty desperate at this point. One of the things I'm most proud of since I came on the scene five years ago is that I have managed finally to get it fully established to the media that one can be a feminist and fully uphold the great progressive principles of the feminist movement of the last 200 years without being part of NOW or even

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approving of NOW. I just *hate* the present NOW.

In terms of affirmative action, I am *stunned* to see affirmative action, which was one of the great no-nos in the national debate, suddenly come to the fore. When I gave the lecture at MIT in September of 1991, one of my first public appearances—I went on for hours, thousands of people turned out, it was very turbulent, people were yelling—well, that night with enormous trepidation, toward the conclusion of the lecture, I said, "I know this is going to be extremely controversial, but I feel that minority designations are short-sighted and they have outlived their usefulness. They should be *dropped*." I'm telling you, I was practically in a *sweat* to raise that issue.

"The elite schools were *destroyed* by affirmative action for women, not for blacks. The way the Ivy League just absolutely, servilely pursued candidates because of the nature of their *gonads*, not the nature of their mental life or of their intellectual accomplishments: Every single humanities department faculty in the Ivy League was polluted and destroyed by affirmative action in the '70s and '80s, and we are paying the price for it now."

But I regard affirmative action as pernicious—a system that had wonderful ideals when it started but was almost immediately abused for the benefit of white middle-class women. And the number one sign of it is in the universities. The elite schools were *destroyed* by affirmative action for women, not for blacks. I want to see more African Americans everywhere, but I do not want to see any kind of quota system. The way the Ivy League just absolutely, servilely pursued candidates because of the nature of their *gonads*, not the nature of their mental life or of their intellectual accomplishments: Every single humanities department faculty in the Ivy League was polluted and destroyed by affirmative action in the '70s and '80s, and we are paying the price for it now.

Reason: You repeatedly call yourself a Clinton Democrat. What do you mean by that?

Paglia: I can't help it. I like him. I know he is a terrible administrator. He has very bad judgment in choosing staff. I'd like to fire the whole staff. I know I just cannot blame the staff, because he's responsible for choosing them.

But I liked the Clintons in the campaign. I thought they were a great power couple. I think that he needed her to be around him, because she is shrewder than he about a lot of things. He needs her to be like the mastermind, to discipline staff and keep him on a schedule. And I think that the fall of the Clintons came the moment he split her off from himself and put her in charge, very hubristically, of health care. A job for which she had no real credentials, a process in which she behaved like Evita Peron and totally lost my respect—the secrecy and the high handedness, the arrogance, the simplistic political judgments that brought down the whole enterprise.

I've never left behind the larger principles of the Clinton Democrats.

Reason: What do you believe are the larger principles?

Paglia: I believe that we are suffering from a false polarization of liberal versus conservative in this country, and what is needed by the '60s generation, to which the Clintons and I belong, is a kind of rethinking.

To say in effect: We uphold the great liberal and progressive principles of the '60s, which would be racial harmony, equal rights for women, toleration of gay lifestyles, and so on. But at the same time, to acknowledge the *excesses* of the '60s—the way there was a total breakdown of law and order, a self-destruction by drugs. (And I support legalization of drugs even while I can see the damage that was wrought to my generation through drugs.) How the sexual revolution ended in AIDS. Again, I uphold all pagan expressions of sex. And at the same time I say that this is the way nature reacts toward unrestrained promiscuous sex, that the evidence was there in the history of syphilis. It's not true that AIDS came out of nowhere. I feel that Clinton was beautifully positioned to lead a kind of national discussion on these issues.

Leftism should be about the people. That's how it began. Instead, what it has become in the last 20 years is a white upper-middle-class elitism which *preaches* to the people and says, "Oh, you don't agree with us? You're homophobic, you're so uneducated. You're in the darkness. You need us to bring light and truth to you." I hate that paternalistic, condescending kind of stuff that's coming out of this lawyer-heavy elite structure of the Democratic Party in Washington.

Reason: You also call yourself a libertarian. What do you mean by that?

Paglia: I consider myself not a conservative libertarian but a radical '60s libertarian.

Reason: How would you differentiate those two categories?

Paglia: I believe that government should confine itself to the public realm and that it should be as stripped down as possible, within reason. It should not be burdened by excess bureaucracy.

I feel that government has no right to intrude into the private realm of consensual behavior. Therefore, I say that I'm for the abolition of all sodomy laws. I'm for abortion rights. I'm for the legalization of drugs—consistent with alcohol regulations. I'm for not just the decriminalization but the legalization of prostitution. Again, prostitutes must not intrude into the public realm. I think it's perfectly reasonable to say that civil authorities have the right to say that prostitutes should not be loitering near schools, or on the steps of churches, or blocking entrances to buildings and so

on. Prostitution should be perfectly legal, but it cannot interfere with other people's access to the public realm.

Furthermore, the public realm is not *owned* by Judeo-Christianity. It is *shared* by people of all cultural and religious backgrounds. Therefore, I'm arguing for the Greco-Roman or pagan line, which is very tolerant of homosexuality and even of man-boy love. I've argued controversially for a reduction in the age of consent to 14—there are some countries in the world that do have that. I'm open to considering even lowering it further.

That's the way I would be separate from a conservative libertarian, who would not necessarily take the position of the legalization of drugs or the very positive attitude I have toward prostitutes and pornographers and drag queens. I take a celebratory attitude toward them. Similarly, I think that most conservative libertarians would not agree with my idea of lowering the age of consent and so on.

Reason: Most libertarians, however you modify the word, would include other issues also, including free markets for things besides sex, drugs, and popular culture.

Paglia: In the first chapter of *Sexual Personae*, I made a defense of capitalism. I feel that capitalism has a very bad press with the pseudo-leftists who clog our best college campuses and that in point of fact capitalism has produced modern individualism and feminism. Modern capitalism has allowed the birth of the independent woman who is no longer economically dependent on her husband. I *despise* the sneering that our liberal humanists do about capitalism even while they enjoy all of its pleasures and conveniences. I just despise it.

However, I do believe that capitalism is inherently Darwinian and that a totally free market is ultimately inhumane, because you'll have what happened in the 19th century—a kind of piling up of profits at the very top, with working-class people falling way below. I do think that there should be some kind of safety net, that we should not tolerate, in an affluent society, extreme levels of poverty or deprivation.

At the same time, I think that the way that the welfare state has developed is just atrocious. It's part of the condescension and paternalism and the guilt of the affluent white upper-middle class to say: "Oh, they'll be taken care of." And so we have that huge culture of dependency which is suddenly, shockingly being broken, just like affirmative action. I never *dreamed* of the speed with which these issues which have been so long suppressed have come to the fore, and it seems like anything is possible now.

I think it's a very exciting time; I only regret it's not my party, the Democratic Party, that started this whole process. Because Clinton was elected for change. I wish that he had taken the aggressive tack the Republicans have of really investigating every single bureaucracy, stripping it down.

I despise bureaucrats. I despise administrators. That has been one of the most pernicious effects of the post-war years in academe. There has been an overgrowth of an arrogant master class of administrators on college campuses who are being paid *twice* the level of the salaries of the faculty and regard themselves as being in charge and everyone else as being their *lackeys*. What the Republicans are doing in Washington, looking at the federal government, I want people to be doing on the college campuses—to have a thoroughgoing review of this parasitic class of administrators.

Reason: One of the strangest things about the response to you is how you've been embraced by conservatives—not libertarians, actual conservatives, even those who would abhor many of your views.

Paglia: I wouldn't say I've been totally taken up by them because after all I'm attacked in *Commentary*—Elizabeth Kristol attacked me. I love the way *Vamps & Tramps* was attacked by both *Commentary* and *The Nation*, from right and left.

But I think that many conservatives, like many priests, seem to like me. I don't think it's because they agree with my views but because they are just invigorated by my discourse. I've constantly said, about Rush Limbaugh, for example—even though he and I don't agree politically, I have always respected him because I feel that he is a principled thinker—I think that any true intellectual finds it stimulating to listen to a principled thinker, a person who has a vigorous independent mind, a new way of approaching contemporary issues. It helps you to reexamine your assumptions and firm up your assumptions. And I think that's what's missing from our culture right now.

For example, in early 1994 I was invited to speak at Harvard's Kennedy School of Government, and there was a dinner with the policy fellows, about 50 people in the room. Highfalutin' media people and academic people. During this meal, Rush Limbaugh came up casually—some woman who was a radio person in Connecticut mentioned that her competition was Rush Limbaugh, and there was a snicker throughout the entire room.

Well, I lost it, I went totally bananas. I lit into them, and I said: "This is outrageous, this kind of demonization of Rush Limbaugh! How many people in this room have actually listened to his program?" One

PHOTO BY MATT HOLLERBUSH. COPYRIGHT ©1995 BY PLAYBOY.

hand, all right? "How many people here have looked at his books, which are bestsellers?" No one. "You are supposed to be here at the Kennedy School of Government as experts in contemporary politics, contemporary cultural issues, right? Do you understand that when you have that attitude toward Rush Limbaugh, you are insulting and demeaning and excluding the *millions* of his listeners? There's an entire *world* out there in America that you have no knowledge of!"

Of course, everything I said that evening was a prophecy, because later in the year when the Republican sweep went through and Rush Limbaugh was celebrated in Washington, I'm sure my words came back to haunt many of those people. Suddenly all the media were like, "What happened? We don't understand any of this at all!"

Anyone who had been listening to Rush Limbaugh, monitoring what was going on on *The Rush Limbaugh Show* with an open mind, would not have been surprised with the Republican sweep. One saw it building for *years*. There was no surprise in that sweep to anyone who had been intelligent enough to be interested in the general culture outside of this Washington–New York–Cambridge insular, arrogant little coterie.

Reason: You're proud to say you watch television.

Paglia: I love television. I love soap operas. I love *The Young and the Restless*. It's my favorite show. I love everything about television. The ads. I love the glitzy part of TV. I love *Hard Copy*. I learn a lot of things from *Hard Copy*. You'd be surprised. Television to me *is* the culture.

In point of fact, that is where politics is being decided, for good or for ill. The TV screen is now like the national community forum. It's a way that people test out candidates. Without television, Clinton could have never won the presidency. We watched him being tested over time.

I just don't believe that television has been negative. In fact Marshall McLuhan quite correctly pointed out—a thought I had independently—that Hitler could never have risen if television had existed, because Hitler would not work well on TV. He was primarily an orator. If you really look at him up close, he looks ridiculous. So I think especially now with C-SPAN—my God, what a change! C-SPAN has allowed us to really look unedited at major news events, even minor news events, and then to compare how they're *reported* on the major network news shows. We see that kind of naked bias and manipulation of the news that I was very aware of as a student of TV and an admirer of TV.

Reason: In a lot of your writings, you have at best an ambivalent and at the extreme a very hostile view of the professional workplace, of office life. I'm curious about that.

Paglia: I've had a tremendous struggle, just because of my personality type, with doing well in that kind of a group situation. I feel very claustrophobic in an office environment. One of the first jobs that I got fired from was at a payroll office. I hated being in this large room with other people. I got fired because I wasn't good at it.

What I am talking about is the committees that I have been forced to sit on in the academy. I do not work well in meetings or committees. I'm an inflammatory type. I get very impatient. I think people are wasting time. My attitude toward committees is, "Just give me all the work and I'll do it! I'll do it in less time than it takes us to talk about what we're going to do!" I'm terrible.

It's not that I have a hostility to office life, it's just that I'm *personally* temperamentally unsuited to that kind of just sitting there for hours letting your rear end go dead. I'm very restless physically. I want to be moving. I don't like to be kept in a room with people for that long.

I'm also very aware why very masculine men are not represented in academe. Very masculine men cannot sit still long enough. And so all the ideology of feminism is coming out of these women who are married to wordsmith men, who are not that combative or confrontational to begin with, because the really masculine men, the high-testosterone men, are so restless they can hardly sit still in class.

I'm very, very worried about this new kind of bourgeois imperialism which predicates the ultimate human type as someone who is good at sitting still at a desk.

Reason: Schools have rewarded that for a century.

Paglia: Well, here's the point. My father's generation, the Italian immigrants—my father was born here but my mother was born in Italy—they were leaving school earlier. The boys who were really restless were leaving school at 14.

Reason: People who were leaving school at 14 were not becoming college professors.

Paglia: I know that. What I'm saying is that in terms of ideology, sexual politics, we're getting a *biased* view.

People of the white upper-middle-class professional elite have very little direct contact with working-class men, even though the working-class men are everywhere around them and are keeping everything going. They are the ones who are the janitors, the construction workers, the plumbers, the police and fire-

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men, and so on. It's everywhere.

But the world that those men have created works so well, they maintain it so assiduously, that there has been a contempt on the part of these complacent, pampered, coddled upper-middle-class people who are spouting a lot of this rhetoric. There's this arrogance that masculinity isn't something that we need anymore—this is the Gloria Steinem line: Masculinity is something that is pernicious and is the cause of all wars and destruction and violence and battering against women, and slowly we're going to be programming it out of our youth.

I said it in the *Playboy* interview: All it takes is one natural disaster for that entire artificial world to come crumbling down, and suddenly everyone will be screaming and yelling for the plumbers and the construction workers. Only masculine men of the working class will hold the civilization together.

Reason: Since you're always ragging on WASPy middle-class people, let me ask you about two different feminists in the public eye. One is your friend and mine, Christina Sommers [author of *Who Stole Feminism?*], who is a very nice, WASPy, bourgeois, conventional academic. And the other is Naomi Wolf [author of *The Beauty Myth* and *Fire with Fire*], who is the ethnic daughter of Berkeley bohemian leftists, who insists on telling the world in the pages of *The New Republic* the details of her sex life and who doesn't have a regular job. Yet it is Christina Sommers who is the rigorous critic of victimhood feminism, and Wolf is its darling. How does that fit into your anti–middle-class schema?

Paglia: Number one, there are two different generations. Christina Hoff Sommers is my generation, so she's coming out of the '60s revolution. She's a very independent-minded woman. Christina Sommers, as I made clear in the introduction to *Vamps & Tramps*, was out on the scene before my first book ever made it into print. In the late '80s, she was already out there, fighting hand-to-hand in the professional philosophers association against the encroachment of a certain type of propagandistic feminism.

She was one of the earliest people who wrote to me to express her support of my work and to pass on to me all these documents about her struggles in the American Philosophical Association. She is one of the most courageous women of my generation. She went out single-handedly without even Paglia out there to take some of the abuse.

Her spirit is actually the '60s spirit. She's someone who believed when she entered professional philosophy that women should achieve at the highest levels that had been established by men of the past. She believes with me that the proper education for young women is exposure to the *greatest* that has been thought, the greatest that has been written or achieved in the history of the arts, in philosophy, and so on. One does not go around finding fifth-rate works by women or 10th-rate works by women and using up precious college time in women's education for that.

Secondly, Naomi Wolf. One of my criticisms of Naomi Wolf is that, excuse me, the portrait of her parents as left-wing is one of her pieces of propaganda. Her father, if you just read his prose, is a very sober, learned man, a traditional scholar. And this is part of Naomi Wolf's propaganda about her life.

Next, one of my major criticisms of Naomi is that she has drifted from any kind of ethnic affiliation. I have constantly said this about her, Susan Faludi, or Gloria Steinem: that these women are not identifiably *anything*. Feminism has become their entire metaphysical, religious, and cultural world view. But feminism is not sufficiently developed as a system yet—at least it wasn't before *me*! What I'm trying to do is add aesthetics and psychology to the very narrow kind of ideology that these women are fanatically promulgating.

That's one of my criticisms of Naomi, that she's so WASPized. She has adopted this WASP manner, OK? It's a completely bland, white-bread, upwardly mobile manner, OK. There's nothing Jewish about her. That's one of my charges against her—that she's simply a *yuppie*.

Meanwhile—in fact, I couldn't believe *Playboy* put this in—they cut my whole philosophy of feminism to leave space for my theories about Naomi Wolf's hair! I'm saying that without her hair she would never have gotten attention at all. There were a million books like that, *The Beauty Myth*—a lot of books. It was only her hair that gave her cachet. People remembered her hair, and the male reporters thought she was hot, and she spent a lot of time sticking her boobs in people's face. She's done this seductive number on men for her entire career. Her primary style of approach is seduction.

Her thinking is completely incoherent, as opposed to someone like Katie Roiphe [author of *The Morning After*], who in my view is a true intellectual who has a very, very fine book. She is the first intellectual of her generation, and I hope she can survive psychologically after the devastating and malicious attacks on her by the feminist establishment, like that bitch Katha Pollitt, the biggest Stalinist of them all, in *The New Yorker*—a lying piece of defamatory prose that I hope she burns in hell for. I have constantly said

"Anyone who had been listening to Rush Limbaugh, monitoring what was going on on *The Rush Limbaugh Show* with an open mind, would not have been surprised with the Republican sweep. One saw it building for *years*. There was no surprise in that sweep to anyone who had been intelligent enough to be interested in the general culture outside of this Washington–New York–Cambridge insular, arrogant little coterie."

that Katie Roiphe's book is a wonderful description, from the inside, of the American bourgeois mind. I think that's the way she should have been packaged by her publisher.

Naomi Wolf—whatever the prevailing wind is, Naomi Wolf will go with it. So she was pushing P.C. feminism, and all of a sudden it turned out, "Gee, the Paglia brand of anti-P.C. feminism is more popular. I think I'll go in that direction now!" So then her next book completely reverses the last book. No one notices, because her readers are all nincompoops—they don't notice anything.

So when *New York* magazine did a story on her and asked me about my many ideas that are running throughout her work now, I said, "As a teacher, I am happy to be completing Naomi's education, which was so deficient at Yale." And I said, "Look at what Yale and Harvard are doing to young women! They produced Naomi Wolf—a Rhodes scholar—and look at Susan Faludi: Her mind is a mess, and she's a Harvard graduate."

"One has to accept Freud's idea of civilization and its discontents. Everything that is civilization is based on some form of instinctual repression or delayed gratification. And maturity is really about realizing the limits on one's ego, and where social reality begins. I don't believe in obedience, total obedience. But I began to realize that I had been insulting about institutions—that in point of fact, institutions are civilization. They are not oppression. They *are* civilization."

Christina and I—we are in despair, really, about the younger generation, because we thought that women were moving forward. I have worked and worked, and so has Christina, to hone our analytical skills; again by absorbing the great masters of rhetoric and analysis, whether they're male or female.

We have truly mutilated the minds of a whole generation of young women, and it's going to be another generation before we can recover.

Reason: You shouldn't exaggerate. It's a very small percentage of young women who are going into these women's studies programs. Lots of young women are studying science, economics, or they're pre-med, etc.

Paglia: I mean in the *humanities*. The women's studies influence is not just concentrated in women's studies courses: It really has passed throughout the curricula of humanities departments. I'm telling you it is a *disaster*. People who are in economics or law, fine. Medicine, fine. I'm talking about the arts. The arts have been poisoned by the P.C. rhetoric everywhere.

Reason: You say that your 1960s generation, of which you are very obviously proud, failed to appreciate the positive role of institutions. What do you mean by that? What institutions?

Paglia: When I got my first job at Bennington College in 1972, I still believed in the '60s idea, "Do your own thing." I believed in full self-expression. I was very impatient with institutions, I hated procedures, I hated Robert's Rules of Order, I hated the committee work we were talking about. I was just totally disrespectful of all those processes. I thought, "Oh, these old fuddy duddy things sitting around for hours in boring meetings." I began to learn the hard way about institutions by the fact that I was in such conflict with them from the first semester on of my first job.

It's a small place in the middle of nowhere in Vermont, so everything was magnified. I caused crisis after crisis up there. I would say something—obviously, I have a great skill at soundbites, that's clear, but I didn't know it at the time. Everything I said was instantly quoted, instantly inflammatory; I would get involved in scrapes and scandals, and the institution would come to a halt. The parents would call to complain, or there had to be a committee where I was brought forth in front of the committee and people had to meet on me and what happened and have the people come in and testify. It was, like, *endless*.

And at one point during one of these inquiries, I said to the committee, "Well, look, I'm an Italian. I'm not going to stand for slights to my honor, insults. We have to avenge things!" And an elderly faculty member said, "Maybe there's a conflict between being Italian and being a teacher that you have to face." I thought, "This is very interesting."

I was forced to realize that even though what I was doing was in the '60s ideal of doing your own thing, total flamboyance, I was causing a great deal of trouble to a great many people. These faculty members were forced to take time from their busy lives to sit for hours and days in taking this testimony and in weighing judgment.

So I began to realize the degree to which I was diverting the institution from its educational mission. That what I was doing, being myself, was obstructing something that I had an idealism about—that is, that I have a vocation as a teacher. I was forced to face this in ways that many other members of my '60s generation did not, those who did not go on into a profession.

I was already in the process of considering the degree to which one has to accept Freud's idea of civilization and its discontents. Everything that is civilization is based on some form of instinctual repression or delayed gratification. And maturity is really about realizing the limits on one's ego, and where social reality begins. I don't believe in obedience, total obedience. I am a '60s social activist. I believe that where there is injustice, one must act out to remedy it, and I'm very confrontational in my life. But I began to realize that I had been very insulting about institutions—that in point of fact, institutions are civilization. They are not oppression. They *are* civilization.

Reason: When you write about gay men, you

seem to appreciate them mostly as exemplars of the dramatic in life, of rebellion against bourgeois society. But I personally know a lot of gay men who want bourgeois lives, and that is very much the cutting edge of at least part of the gay movement today. People want to be themselves but to have committed relationships, to be very bourgeois.

Paglia: It's an argument going on now in the gay world, with Bruce Bawer coming out with his book [*A Place at the Table*] on that side and so on. What I'm saying is the contribution of gay men to culture, what makes them highly individual in the history of culture, is not that they are settling down and being like everyone else—that is, just responding to their natural and normal human needs—but rather what they have done in terms of the history of consciousness.

That's part of my argument, for example, with my friend Harvey Mansfield, the conservative at Harvard. His argument would be that homosexuality is antithetical to civilization and to culture, that it is disruptive and anarchic. And my argument is the opposite: that gay men—not all gay men, but many gay men—have in fact built Western civilization. That their contributions to the history of consciousness and the creation of art have been major in making the West what it is—for whatever reason.

It is natural to want to settle down. There should be an experimental period in one's life, it seems to me, where one tries everything new, but if you continue in that stage beyond, let's say, age 30, I think that that kind of restlessness is a sign of immaturity rather than creativity.

Reason: Right now there's a lot of nostalgia among people who define themselves as communitarians, on both the left and right, for the 1950s. You portray the 1950s as boring and claustrophobic. What do you think of this current nostalgia?

Paglia: The '50s were a wonderful time if you happened to be a blonde WASP cheerleader. Great! But if you were Jewish or gay or a tomboy, like me, or any kind of dissident, it was a very repressive and conformist period.

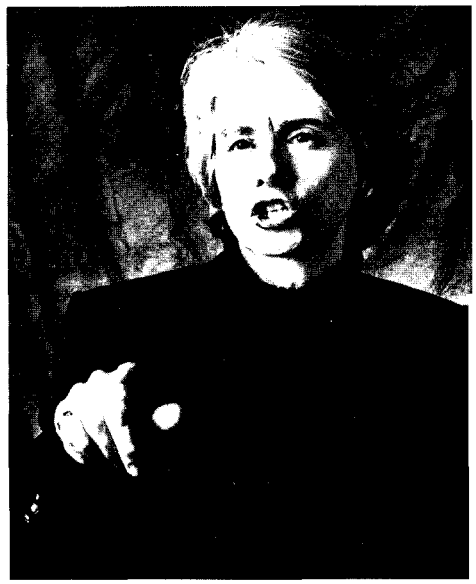
David Halberstam's book [*The Fifties*] is talking about how wonderful the '50s were—it was a very vigorous time. Well, he's a little older than me. So what he is remembering is authentic. There was indeed a very vigorous Jewish culture at that time. I think the New York world for Jews at that time, intellectual Jews, was wonderful.

But please! For my generation, the baby boomers, born just after World War II, the '50s were a *horror*. I don't care what David Halberstam says about his experience. It is just inaccurate. Certainly there were things going on that led to the '60s, absolutely. I've said this all along that the beatniks were the precursors. But they were the adversary culture—the oppositional culture. They were stereotyped and pilloried everywhere. Anyone who tries to say that mainstream culture was fab in the '50s, they're just not thinking straight.

Reason: Most of the nostalgia isn't of the intellectual, Halberstam variety. It's that families were stable, streets were safe.

Paglia: It is true. Things were very stable. But the point is that we've gone through enormous cultural changes. Just take the example of the automobile. I remember riding my bicycle to school in Syracuse—it was about 1957, '58—and riding quite an enormous distance on this old bicycle, and there were hardly any cars. You wouldn't dream of doing that today. The number of cars has not tripled but quadrupled. In photographs of New York City from the '50s, you can hardly believe how little traffic there is.

All of a sudden there was an enormous explosion of people who owned cars. Cars became very dangerous. Young people were driving cars. Then the '60s unleashed the dangers of assassinations and kidnappings and murders, and all kinds of stuff.



You can't go back again. The idea that we can recreate that, that is just crazy. It's absolutely crazy. We are moving forward, for good or for ill.

Reason: Somebody once described you as "Ayn Rand on mushrooms." I'm curious whether at some point in your life you've had any encounter with Ayn Rand's work or people influenced by her.

Paglia: Ayn Rand was an enormous figure for people who were intellectuals in college in the mid-'50s and late '50s. I entered college in '64, so I never heard her name in college. She was just gone.

I never read Ayn Rand until people started to compare me to her. Since I came on the scene it has come up repeatedly—people have asked me about Ayn Rand, followers of Ayn Rand. I might be on a call-in show; they always asked. Because I was being asked so much, I went out and I read some of Ayn Rand. And I was struck. I could see what the parallels are.

That is, she was influenced by many of the same works that I was. She was reading Romantic thinkers and Nietzsche and so on. There are certain passages in her where I went, "Oh my God, that sounds like a passage from *Sexual Personae*." So I was really struck.

At the same time, I saw the differences. First of all, she's a libertarian or a radical individualist as I am, but she is very—like Simone de Beauvoir—contemp-

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tuous of religion. I am an atheist, but I *respect* religion. I respect all the world religions, and I regard them as these symbol systems, belief systems that are like poetry. I *love* these great mythological systems. I feel that mystical and religious thinking tells you more about the universe in many ways than ordinary prose, or even science, does.

So I'm uncomfortable with that. For both de Beauvoir and Ayn Rand religion is symptomatic of an infantile mind, or of an overemotional mind. I believe in mystery; I believe in both Apollo *and* Dionysus. So I think that my system is more complete.

And what else? I find both Simone de Beauvoir and Ayn Rand deficient in humor. Comedy is my attitude toward life, and I feel that comedy is the spirit of the last half of the 20th century. The first half of the 20th century would have been the age of Beckett and *Waiting for Godot* and that whole bleak, nihilistic attitude toward the world that Susan Sontag is still carrying around with her like a big black hat. The attitude of the last 50 years is like that of rock and roll—energy, comedy, exuberance, the pleasure principle, improvisation, spontaneity. These are my principles. So I think I have a kind of childlike quality and playfulness that are missing from the dour adulthood of both Simone de Beauvoir and Ayn Rand.

"I find both Simone de Beauvoir and Ayn Rand deficient in humor. The attitude of the last 50 years is like that of rock and roll—energy, comedy, exuberance, the pleasure principle, improvisation, spontaneity. These are my principles. So I think I have a kind of childlike quality and playfulness that are missing from the dour adulthood of both Simone de Beauvoir and Ayn Rand."

Also I am a little bit uneasy, OK, with the politics. I don't think that Ayn Rand is a fascist particularly, but I think there is a kind of contempt for ordinary people in Ayn Rand—a little bit. I love the high achiever, I am a great worshiper of the high achiever. But I also feel at home with people of the working class. And I think that in Rand there's a little bit of a kind of snobbish elitism about those vulgar masses out there. That makes me a little uncomfortable with her.

But I think if one is looking at parallels, there is no doubt that there are a lot. I'm very happy to be considered one of her successors, even if not influenced by her directly. And I think there is no doubt that my impact on many people is exactly like her impact on many people. That is, we came as kind of a fresh breeze into a period of conformism. She and I say to people, "Think for yourself! Don't be such a toadie! Stop going along with the group! Don't be such a sheep, just going along passively with other people!"

One would think that women's studies, if it really obeyed its mission, would make her part of the agenda. But no, of course not! Women's studies has been oriented toward rediscovering the mediocre thinker, or the writer who talks about her victimization, rather than someone who preaches individualism and independence as Ayn Rand does.

Reason: You always talk about the limitations of nature and you emphasize the imperfectibility of the world—you're anti-Rousseauian—but you do seem to be optimistic, to believe in some kind of progress.

Paglia: I think I am a progressive thinker, ultimately. But I do believe that we go two steps forward and one step back. But there is still a general movement forward.

I'm also a decadent thinker, so far as I see cultures as waxing and waning. I see this cyclic movement in history, where you have a society that grows, expands, overexpands, and collapses. And there's a period of a dark age, and then you have another culture slowly building up.

In that sense I've been going against the grain of a lot of thinking in the post-structuralist–influenced humanities departments: "History is a bunch of meaningless fragments." Well, that's not what I see. And that's not what Jews see, who at Passover remember something that happened 5,000 years ago. So I do think that history is a story, that it's a narrative and that it's our obligation as teachers to try to pull together all the disparate parts—to try to give the students a coherence, a core sense of the cohesiveness of history, without these tired formulas of multiculturalism. I believe in an enlightened multiculturalism based on scholarship, but I hate this kind of moralistic trumpeting about the imperialism of the West and the atrocities of white men versus women and people of color. I'm so *tired* of that.

I think I'm like this one-man truth squad who goes around and hits, hits, hits on all these issues. At the same time I am basically in agreement with most of the progressive agenda. Sex studies *should* be on the agenda, not as women's studies but as something else. I have given my career to that, long before anyone thought of women's studies.

Every single issue where the P.C. academy thinks it's going to reform the old bad path, I have been there before they have been, and I'm there to punish and to expose and to say what they're doing—the New Historicism coming out of Berkeley, for example—is a piece of crap.

I'm outside the establishment completely, and no one can co-opt me. They can't get to me. Because I don't apply for grants, they can't punish me like that. And I appear out of *nowhere*! They think they can avoid having to deal with me, never mentioning me and so forth, and then all of a sudden, the students invite me. And there I am! And I come on campus, and I name names on the podium. And then I leave and create disorder, and they all have to deal with it for weeks. It's great! It's wonderful! ◆

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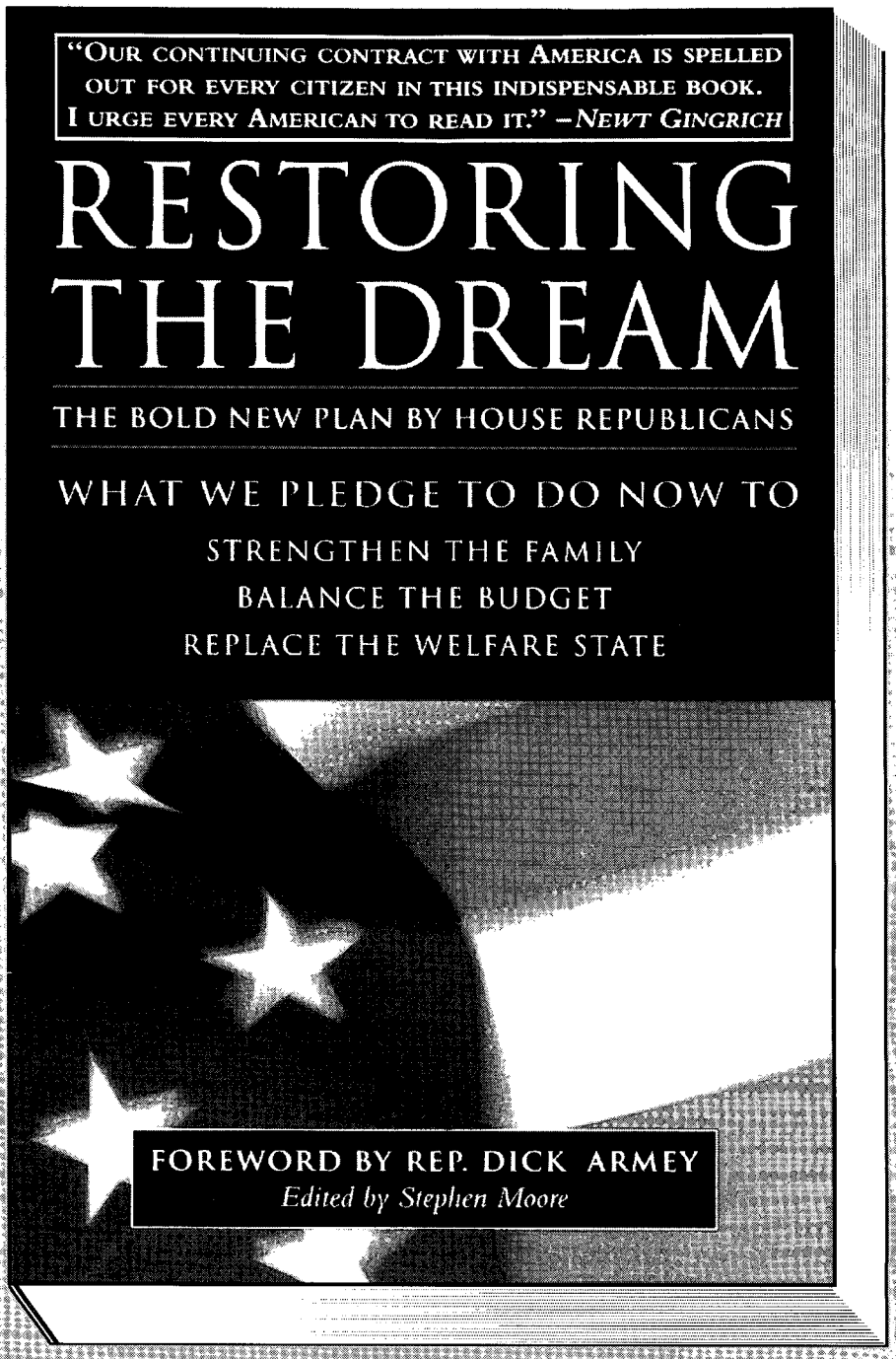
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The Mall's in Their Court

By Scott G. Bullock

Forcing shoppers into the public square

THE RIGHT TO KEEP UNWANTED INtruders off our property is a cornerstone of American liberty. But not if one's property is a shopping mall.

If a recent ruling from the New Jersey Supreme Court in the case of *New Jersey Coalition Against War in the Middle East et al. v. JMB Realty Corp. et al.* is not overturned, Saturday afternoon shoppers in New Jersey may find themselves regularly fighting for space with anti-war protesters or homeless-rights activists.

The New Jersey case began in November 1990, when a national debate raged over America's impending war with Iraq. An anti-war coalition in New Jersey began distributing literature and requesting donations at privately owned shopping malls. At malls in Short Hills and Hackensack, representatives of the groups began to canvass shoppers without asking permission or even advising the malls.

After receiving complaints from surprised customers, mall managers informed the demonstrators that they prohibited leafletting and demonstrations on their property, and asked them to leave. A month later, the demonstrators were back, running through the mall with banners chanting anti-war slogans and pushing customers out of the way. Customers understandably left the mall in droves.

Incensed that the malls were treating them like common trespassers, the anti-war organizations, with the assistance of the American Civil Liberties Union, filed a lawsuit demanding access. After losing in the lower courts, the New Jersey Supreme Court ruled late last year that the coalition had a free speech right under the state constitution to leaflet at the malls.

Chief Justice Robert Wilentz's opinion for the court is a paean to free speech rights and a dispirited essay on the decline of the traditional town square. Wilentz determined that because shopping malls played such an enormous role in the decline of downtown areas, they now have an obligation to provide a forum for social activists. The chief justice dismissed the delineation between private and public property as an anachronism.

A New Jersey court opinion forces mall owners to provide a forum for views to which they object.

BUT JUSTICE WILENTZ UNDERSTANDS THE desire to exclude outsiders in other contexts. In 1989, the same Justice Wilentz denied the producers of the film version of Tom Wolfe's *The Bonfire of the Vanities* use of an old New Jersey courtroom commonly used for movie production because he didn't like the book's depiction of minorities and thought it inappropriate for a New Jersey courthouse to be used to film a courtroom scene.

Unfortunately for Justice Wilentz, free speech rights apply to *public* forums. A U.S. District Court judge issued a stinging rebuke to Wilentz, overturning his order and holding that the learned justice had deprived the producers of their First Amendment free speech rights.

Despite Wilentz's record of selective concern for free speech, he held in the shopping mall context that free speech must win out over private property rights. Wilentz's opinion recognizes in passing the property rights of the mall owners, but concludes that "when they [property rights] are exercised...in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former." Wilentz then lets his true colors show: "That does not mean that one is fundamentally more important than the other, although we believe it is, but rather that here the correct resolution of the conflict between these rights is self-evident."

Out of supposed respect for property rights, the court stresses the ability of malls to impose reasonable "time, place, and manner" restrictions on the activists. These blithe assurances from the court, however, give little comfort to mall owners forced to accommodate social activists while still engaging in commercial activity—especially since they fear any such restrictions they might impose could be challenged with a lawsuit that they might lose.

Such concerns are well-founded. Professor Frank Askin of Rutgers Law School, who assembled the legal team that originally sued the shopping centers, is upset with what he considers the narrowness of the ruling. He is already threatening, along with an eager team of law students and attorneys, to bring suit against shopping malls that he believes are overly restrictive in what they allow. Askin may eventually be successful in opening the malls to all kinds of expressive activity; if malls truly are the new town squares, then on what principled basis could a future court deny access to all protected forms of expression that are on display in our downtowns, including political demon-

JONATHAN NOUROK

strations, panhandling, and so on? Although limited to shopping centers in New Jersey, Professor Askin hopes that ACLU chapters in New York and Connecticut will try to reopen similar challenges. "They were waiting to see what the New Jersey Supreme Court would do," he said.

When a lower court in Connecticut granted similar access to activists, the Ku Klux Klan applied to leaflet at a mall in West Hartford. Not surprisingly, a counter-demonstration quickly formed when the Klan began to pass out literature. A riot ensued that was only quelled when SWAT teams from two surrounding counties were called in to seal off the mall's entrances. In the following months, sales at the mall declined by 35 percent.

As a result of the transformation of private shopping malls into virtual public squares, mall owners must now make decisions normally reserved for government officials. The dissenting justices in the New Jersey case posed the following dilemmas mall managers will now face: "Should an animal rights group, regardless of its graphic illustrations, be permitted near a pet shop or fur salon? Should the Vietnam Veterans and SANE be permitted to conduct activities on the same day? What standards should a mall manager use when considering the graphic portrayal on a placard, when measuring the strong language in a leaflet or when evaluating the appropriateness of a costume or clothing?" Even more disturbing, the New Jersey opinion forces mall owners, in many instances, to provide a forum for views to which they strongly object, an idea absolutely repugnant to the First Amendment.

New Jersey is not the only state to grant forced access to privately owned shopping malls. California, Washington, Massachusetts, and Oregon have also forced mall owners to allow activists onto their property under various provisions of state constitutions. Only the California Supreme Court, however, has held that the free speech clause of its state constitution, like that of New Jersey, mandates access to private malls.

California malls have also faced un-

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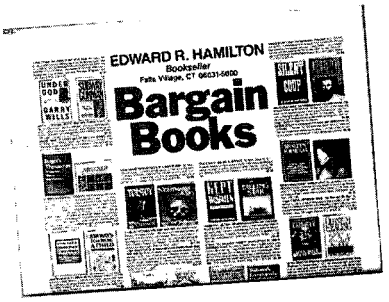

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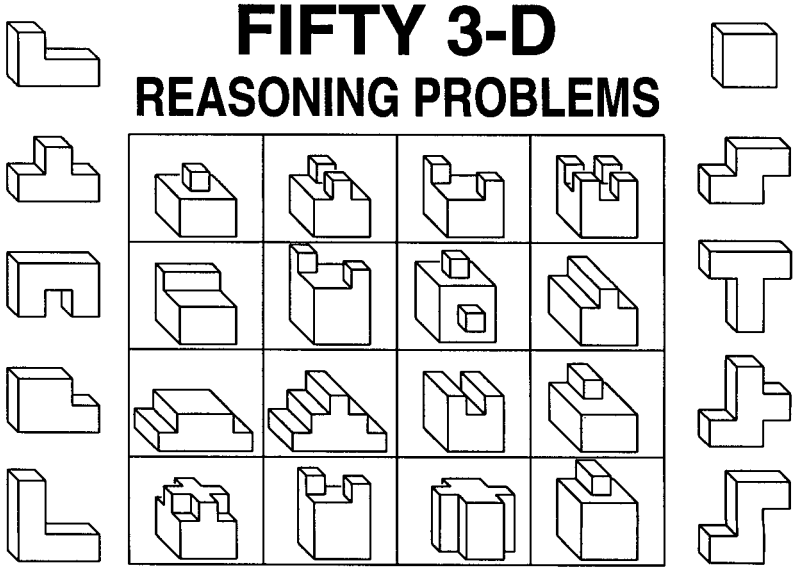

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wanted entry by Planned Parenthood groups passing out condoms in honor of Valentine's Day and pro-life groups that have distributed pictures of aborted fetuses to shocked customers. Some California malls have tried to place regulations on the content and manner of these types of displays (thereby raising another host of constitutional issues), but that has not stopped groups such as Queer Nation from being a persistent nuisance at Sunvalley Shopping Center. On a Saturday in 1990, a group of over 70 Queer Nation activists overran the mall, many dressed in drag, and passed out condoms to teenagers. Before leaving, the group plastered stickers proclaiming "Promote Lesbianism" and "Queers Bash Back" throughout the mall.

The New Jersey Supreme Court's opinion rests on the premise of the demise of the so-called town square, a place where citizens could once gather to hear opinions expressed and ideas debated. The opinion is characterized by a nostalgic longing for this style of communication. But the court ignores the very nature of shopping malls. As Justice Marie L. Garibaldi observed in dissent: "The shopping mall is not a community....As such [it] should not be required to provide forum, place, or occasion for speech making, petition signing, parades, or cracker barrels to discuss local or global events. They are in business for business' sake... [and] however romantic it may be to believe that the public repair to these galvanic places on a Saturday morning for more than bread or salt, they are not yet instruments of the state."

The majority of the New Jersey Supreme Court entirely neglected to consider the interests of the principal users of shopping malls—shoppers. Although the opinion by the court is vaguely conspiratorial about shopping mall owners deliberately destroying downtown areas in pursuit of profit, it is the consumer who ultimately chooses the shopping mall over downtown.

And in many areas, the demise of downtowns is hardly ordained. Indeed, many people who live in the suburbs like to experience, at least on occasion, the bustle, excitement, and variety on the streets and in the stores of the city.

Greatly contributing to the success of shopping malls, however, are the very aspects of modern city life customers like to avoid: crime, noisy protests, panhandling, lack of parking, litter, and so on. Guaranteeing access to political activists will go a long way toward undermining the very features that drove many consumers out of the city and into privately owned shopping malls.

California malls have faced unwanted entry by Planned Parenthood groups passing out condoms in honor of Valentine's Day and pro-life groups that have distributed pictures of aborted fetuses to shocked customers.

It seems hard for the majority of the New Jersey justices to understand why some people do not want to be exposed to important and interesting political discourse at every moment of their lives. However, it should come as no shock that when most people go to a shopping mall, they rarely have any loftier motivation than to shop. Now, because of mandatory access, shoppers can be harangued by anti-war activists, handed condoms by Planned Parenthood supporters, or gaze upon photographs of aborted fetuses held by anti-abortion demonstrators. Mandated access can hardly be considered a victory for consumers.

THE *NEW JERSEY COALITION* CASE IS little more than social engineering by the judiciary. By blurring the definition between public and private, the court not only violates property rights but also eliminates the options currently available to consumers. Now, shopping malls are quasi-public entities, and consumers will suffer the consequences.

The reason for this mischievous and expansive interpretation by state courts of free speech guarantees can be traced to a 1980 decision by the U.S. Supreme Court, *Pruneyard Shopping Center v. Robins*. While recognizing that the First Amendment of the U.S. Constitution does not mandate access to privately owned shopping malls, the Court nevertheless held that state courts that permit individuals onto privately owned property do not violate the Fifth Amendment's Takings Clause or the free speech rights of the shopping mall owners.

The *Pruneyard* opinion, written by Chief Justice William Rehnquist, recognized property owners' right to exclude others, but stated that this right was not "essential" to the use or economic value of the property. *Pruneyard* thus trivializes the most fundamental aspect of property ownership—the right to exclude—because shopping mall owners can continue to engage in economic activity.

The unanimous opinion in *Pruneyard* also emphasized that shopping mall owners have already opened up their property to the public. The opinion ignores, however, the nature of the invitation. Shopping mall owners invite persons onto their property for a specific purpose—to shop, not to create any disturbance they wish to.

One of the shopping mall owners plans to appeal the *New Jersey Coalition* decision of the New Jersey Supreme Court to the U.S. Supreme Court. The time is certainly ripe for such an appeal. Since the time of the *Pruneyard* decision, a renaissance of property rights protection has occurred at the U.S. Supreme Court.

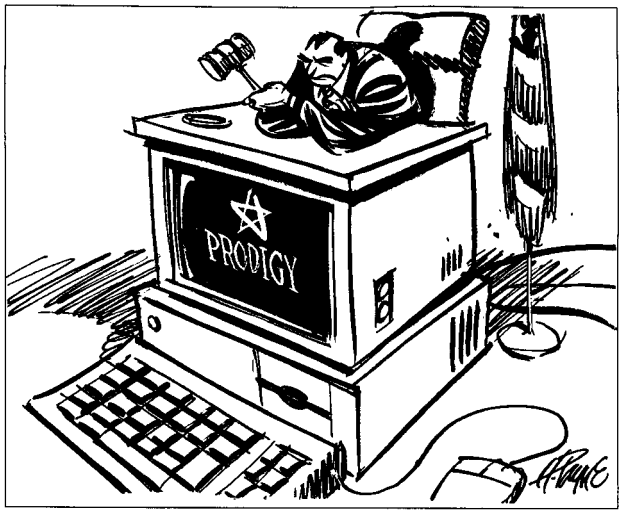
Several cases since *Pruneyard* have struck down attempts by government to turn private property into public places without compensation. The appeal provides an opportunity for the Court to reconsider its indefensible *Pruneyard* decision and to halt the rapid transformation of private property into public squares. ◆

Scott G. Bullock is an attorney at the Institute for Justice, a public interest law center in Washington, D.C.

Chilled Prodigy

By Eugene Volokh

An "anti-censorship" libel ruling threatens choice in cyberspace.



HENRY PAYNE

THE LAW OFTEN DEMANDS that we sacrifice some liberty for greater security. Sometimes, though, it takes away our liberty to provide us *less* security. That's what a New York state court just did, and the U.S. legal liability system may have just claimed another victim: the on-line community.

In October 1994, a message appeared on a bulletin board in the Prodigy on-line service. "The end of Stratton Oakmont [a small stock brokerage] will finally come this week," the message said. "This brokerage firm headed by president and soon to be proven criminal—Daniel Porrush [sic]—will close this week." The message described a particular transaction in which Stratton was involved, and declared, "This is fraud, fraud, fraud and criminal!!!!!!!" Who wrote the message is a mystery. Though it seemed to come from a particular user's account, it turns out that someone else was using that account without permission.

Stratton naturally took umbrage, and sued Prodigy for libel, asking for $100 million in damages, plus another $100 million in punitives. And on May 24, the trial judge ruled that the lawsuit could proceed: Even though the posting, like all bulletin board postings, was made without Prodigy's prior knowledge, the judge held that Prodigy could be held liable for what it said.

Under the law of libel, it's clear that someone who republishes someone else's defamatory statement—for instance, a magazine that prints an article by an outside writer—can be held legally responsible. One can debate the wisdom of this rule, but it makes at least some sense. If my defaming you violates your legal rights, then when REASON broadcasts my defamation to 50,000 subscribers, your injury is aggravated. REASON seeks to profit from my article; REASON has the opportunity to check the article and not run it if it appears to be false; it's at least arguable that REASON should be held responsible for the injuries that its contents inflict.

But it's equally clear that people who merely redistribute defamatory statements can't be held liable. When a newsstand sells a copy of REASON, it's helping circulate its contents, including whatever nasty things I say about you; but the newsstand isn't liable because of this. Likewise, say someone gets a copy of REASON by modem. The phone company is in a sense republishing the text, but you can't get money from the company for its role in ruining your reputation. The law recognizes that no newsstand or phone company can be expected to read and verify every publication that it distributes. Imposing liability in such a situation would be both unfair and chilling to free dissemination of speech.

On-line services are decidedly closer to the phone company or the newsstand than to the magazine. Tens of thousands of messages are posted to the services daily; the services can't read them all and verify their accuracy. In the 1991 *Cubby v. CompuServe* case, a federal trial court recognized this and held that an on-line service couldn't be liable for defamation unless "it knew or had reason to know of the allegedly defamatory statements." Any alternative rule, the court said, "would impose an undue burden on the free flow of information."

SO FAR, THEN, SO GOOD: COMING INTO THE litigation, Prodigy could have expected that, like CompuServe, it would be immune from liability. What happened?

Well, the trouble was that Prodigy took some steps to oversee the bulletin boards that it operated. At least at one point, Prodigy used a software screening program which automatically rejected bulletin board postings that contained offensive language. Prodigy also announced to its users that they shouldn't post notes that are insulting, harassing, or in bad taste. Prodigy employees scanned the bulletin boards looking for such messages, and the Prodigy software allowed those employees to delete messages that didn't fit the guidelines. "Prodigy is committed to open debate and discussion on the bulletin boards," Prodigy said, but "this doesn't mean that 'anything goes.'"

This, the court explained, is what differentiates Prodigy from CompuServe. Prodigy controlled what was said on its bulletin boards: "That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made does not minimize...the simple fact that Prodigy has uniquely arrogated to itself the role of determining what is

proper for its members to post and read on its bulletin boards." And because of this control, for the purposes of libel law, "Prodigy is a publisher rather than a distributor." The court concluded that "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."

The court's reasoning, though, is rather puzzling. After all, even traditional distributors, such as newsstands and bookstores, *do* arrogate to themselves the role of determining what's proper for their customers to read. A newsstand might choose not to carry pornography. Some bookstores refused to carry Bret Easton Ellis's novel *American Psycho*. Some stores specialize in libertarian books, others in communist ones. All newsstands and bookstores select their stock based on some criteria, be they popularity, topicality, nonoffensiveness (or offensiveness), or what have you.

Furthermore, the only way that Prodigy is like a magazine publisher is that it has *some* control over what's posted on it. But the degree of control is vastly different. I assure you that Virginia Postrel (or someone who works for her) has done more to this article than run it through a profanity-checking program. Some human being at REASON has approved every article that REASON carries—not just reserved the right to approve it or disapprove it, but has actually read it and decided whether to run it or not. Not so for Prodigy and the 60,000 messages that are posted every day to its bulletin boards.

Moreover, Prodigy doesn't purport to check messages for accuracy; it just checks them for offensiveness. It's unreasonable enough to expect Prodigy to read every message, but it simply makes no sense to expect it to fact check every message. Why should Prodigy's willingness to maintain some standards of taste translate into a responsibility for its users' factual errors?

What justification could there be, then, for this puzzling distinction between CompuServe (which does no screening) and Prodigy (which does only the limited screening that the large volume of messages allows)? Why should a small degree of extra oversight translate into a vast increase in liability?

WELL, THE COURT NEVER DIRECTLY ANswered these questions, but it did give one suggestion: Prodigy's screening policies themselves, in the court's view, were troublesome (even if not illegal). "It could be said," Judge Stuart Ain wrote, "that Prodigy's current system of automatic scanning, Guidelines, and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for the legal liability that attaches to such censorship." Prodigy's willingness to restrict what's said makes it, in the court's eyes, a censor. If Prodigy does this, it must "accept the concomitant legal consequences."

People who merely redistribute defamatory statements can't be held liable. No newsstand or phone company can be expected to read and verify every publication that it distributes. On-line services are decidedly closer in nature to the phone company or the newsstand than to the magazine.

It is here—in its blithe assertion that private screening and oversight is "censorship" to which there must be "legal consequences"—that the court made its greatest theoretical error. Private screening is not some shady practice employed by nasty thought controllers. Rather, it can be a positive good: It can add value to information by filtering out what people don't want to see.

This is most obvious when the oversight focuses on particular subjects or particular viewpoints: The reason you're reading this magazine is that you like the screening that its editors perform. But screening out profanity or abuse is valuable, too. People don't just want raw information. They also want a sense of intellectual community—the exchange of ideas among people who are on friendly, polite terms.

Insults and profanity can destroy that community, can make the discussion seem more like a war zone than a living room. (This has happened with some frequency on many unregulated cyberspace forums that I've seen.) And when this happens, many people just drop out. People who've been "flamed" enough times, or have seen others flamed, may find that the emotional costs of participating exceed the benefits.

If the government tried to protect people by prohibiting vulgarity on all services, or by ordering that all insults be promptly deleted, that certainly would be censorship. But Prodigy is just a private organization which lets people voluntarily enter into a private community, a community—much like a private club or even a private home—in which certain norms of behavior are enforced.

Before the *Stratton Oakmont v. Prodigy* decision, people had a choice: They could participate in an unrestrained forum, such as CompuServe, or a more restricted one, such as Prodigy. But if this decision stands (Prodigy is planning to appeal it), people will lose this choice. Faced with the risk of $200 million lawsuits, Prodigy and similar services will almost certainly drop their screening facilities. Screening may be a valuable feature, but it's not valuable enough to justify the tremendous increase in legal peril.

So what have we gained as a result of the court's decision? Not security: You and I are no more protected now against on-line defamation than we were before. Because a service can escape liability simply by letting all the messages through,

most services will do exactly that, and future libel plaintiffs will be out of luck. And where before we might have gotten some protection from the service screening out or deleting the worst of the abuse, now we won't even get that.

Nor have we gained liberty. Sure, we might now be able to post offensive messages on Prodigy, though if we wanted to send offensive messages we could have done that all along using CompuServe, or any of a number of Internet service providers. But if some of us would prefer to participate in a more temperate conversational environment, instead of a free-for-all, no one will be able to safely provide it for us. And if flaming and abuse scare people away from the on-line services, all of us will lose the advantages of those people's contributions.

The Prodigy ruling is inherently Procrustean: When the court speaks of the "freedom of communication in Cyberspace," that's freedom of communication only on the terms that the court prefers.

The great virtue of the free market is that it tends to give people what they want, not what the government thinks they ought to want. Those who want an anarchic on-line environment could get it; those who want a more peaceful community could get it, too. The law, though, is inherently Procrustean: When the court speaks of the "freedom of communication in Cyberspace," that's freedom of communication only on the terms that the court prefers. Another lose-lose proposition, brought to you courtesy of our legal liability system.

Eugene Volokh (volokh@law.ucla.edu) teaches constitutional law and copyright law at UCLA Law School.

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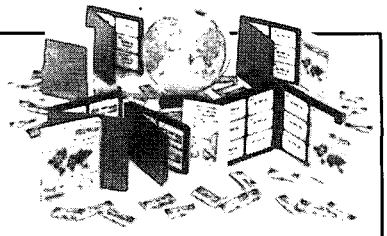

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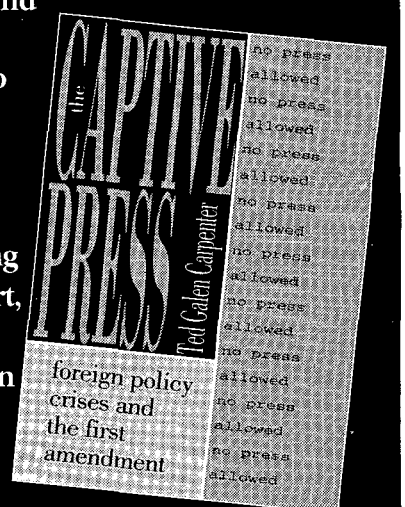

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Daddy Dearest

By Nick Gillespie

Fatherless America: Confronting Our Most Urgent Social Problem, by David Blankenhorn, New York: Basic Books, 328 pages, $23.00

David Blankenhorn: Never before have so many children been abandoned by their fathers.

RAINA SACKS BLANKENHORN

WHEN I BECAME A PARENT ABOUT a year and a half ago, my own father shared some perplexing advice he had received back when he first had children in the late 1950s. He offered it to me in a conspiratorial manner, as if it were knowledge only to be whispered among cabalists sworn to secrecy. Curiously, his first bit of child-rearing counsel came not from his old-world parents but from a new-world medicine man. Paraphrasing Dr. Spock, that pediatrician had told my father it was very important to trust his instincts—otherwise his kids would grow up to be monsters.

My father mulled that one over for awhile, even going so far as to read Spock's *Baby and Child Care*. There he learned that, among other things, "What good mothers and fathers instinctively feel like doing for their babies is usually best." That seemed sensible enough, but left him wondering how he could tell if he qualified as a "good" parent in the first place. In the end, he and my mother opted for a less-bookish path, choosing indeed to follow their instincts—and the examples set by friends, neighbors, and relatives they deemed worthy of emulation.

These then were the paternal axioms my father offered me, with the proviso that they were banal, obvious, and not terribly helpful in any given situation (and no less meaningful or heartfelt for all those limitations): The family comes first, and do the best you can.

A similar vision of pragmatic fatherhood infuses David Blankenhorn's provocative and disturbing book, *Fatherless America: Confronting Our Most Urgent Social Problem*. While there is plenty of room to wonder whether paternity per se is "our most urgent social problem," there is no question that the across-the-board increase in illegitimate births and the growing number of households in which no father is present are trends very worthy of study and analysis. Evidence abounds that fatherlessness correlates very highly with poverty, criminal behavior, and myriad other social dysfunctions.

Blankenhorn succinctly lays out the dimensions of the problem: "The United States is becoming an increasingly fatherless society. A generation ago, an American child could reasonably expect to grow up with his or her father. Today, an American child can reasonably expect not to....Tonight, about 40 percent of American children will go to sleep in homes in which their fathers do not live. Before they reach the age of eighteen, more than half of our nation's children are likely to spend at least a significant portion of their childhoods living apart from their fathers. Never before in this country have so many children been voluntarily abandoned by their fathers....Fatherlessness is...the leading cause of declining child well-being in our society. It is also the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women."

In one sense, Blankenhorn is simply balancing the debate over illegitimacy and its corresponding problems, the solutions to which are almost always discussed in terms of stopping women from having babies. *Fatherless America* properly reminds us that, barring the odd virgin birth, every illegitimate child has a biological father somewhere out there who has fallen down on the job.

In another, more interesting way, however, Blankenhorn sees literal and figurative fatherlessness as an emergent and pervasive social trend throughout all social strata: "As a cultural idea, our inherited understanding of fatherhood is under siege. Men in general, and fathers in particular, are increasingly viewed as superfluous to family life....We face a cultural loss affecting every home. For this reason, the most important absence our society must confront is not the absence of fathers but the absence of our belief in fathers."

IN PLACE OF THE TRADITIONAL FATHER—typically caricatured as a dictatorial, domineering workaholic with little spare time for the wife and kids—we now embrace a dizzying array of inadequate paternal "scripts," argues Blankenhorn, who makes use of current scholarship, popular culture, and focus-group interviews with parents to flesh out his case. These roles include "The New Father," "The Deadbeat Dad," "The Visiting Father," "The Sperm Father," "The Stepfather," and "The Nearby Guy." Although they vary in their particulars—The New Father is a sensitive, androgynous spouse willing to change diapers while The Sperm Father "completes his fatherhood prior to the birth of his child"—the new roles share two common underpinnings: 1) They hold parental rights above those of children and 2) They assume that any specifically masculine role in child-rearing is dispensable, if not inherently destructive.

Blankenhorn marshals an impressive array of anecdotal and scholarly evidence to suggest that such notions are gravely mistaken. Reviewing the anthropological

literature, he notes that fatherhood in human communities always constitutes "a necessary problem. It is necessary because, in all societies, child well-being and societal success hinge largely upon a high level of paternal investment: the willingness of adult males to devote energy and resources to the care of their offspring. It is a problem because adult males are frequently—indeed, increasingly—unwilling or unable to make that vital investment....Margaret Mead and others have observed that the supreme test of any civilization is whether it can socialize men by teaching them to be fathers—creating a culture in which men acknowledge their paternity and willingly nurture their offspring."

Sounding more than a little like George Gilder in *Sexual Suicide* (which is not mentioned in *Fatherless America*), Blankenhorn compellingly argues that while gender roles are flexible, they are certainly not infinitely manipulable. "The sexual division of labor is not, at bottom, the result of social conditioning or cultural values," he writes. "Historically, the... father protects his family, provides for its material needs, devotes himself to the education of his children, and represents his family's interests in the larger world. This work is necessarily rooted in a repertoire of inherited male values....These values are not limited to toughness, competition, instrumentalism, and aggression—but they certainly include them. These 'hard' male values have changed and will continue to change. But they will not disappear or turn into their opposites."

Indeed, the real question is not whether society can eradicate such traits but whether it can harness them for productive purposes. Blankenhorn quotes sociologist and linguist Walter J. Ong to the effect that, across cultures, the adult male "counters his tendency to violent domination by placing any violence in him" primarily in the service of biological relations. Such sublimation, however, suggests Blankenhorn, is particularly difficult for a fatherless boy because he lacks a consistently present male role model who shows him on "good authority that he can be 'man enough.'"

In place of the current voguish, "progressive" notions of what fathers should be like, Blankenhorn develops an anti-ideal that he calls "The Good Family Man." The Good Family Man is a practitioner of what Blankenhorn terms "good-enough fatherhood," a phrase which calls to mind the similarly down-to-earth "good-enough mother" that developmental psychologist D.W. Winnicott conceptualized in the '40s and '50s. The bases of good-enough fatherhood are modest enough, if increasingly rare: "co-residency with children and a parental alliance with the mother."

Much of the scorn heaped on traditional paternal roles comes from academics and other members of the cultural "elite" who vilify the '50s as a particularly repressive time and lay much of the blame at the feet of dear old dad.

"As a father," writes Blankenhorn, "the Good Family Man is not perfect, but he is good enough to be irreplaceable. He is married. He stays around. He is a father on the premises....He puts his family first." Such a conception, Blankenhorn admits, "sounds antiquated, almost embarrassing." But far from being a '90s version of Ward Cleaver, the Good Family Man is highly adaptive: "Flexibility, understood as sharing the domestic workload and establishing a more egalitarian marriage, constitutes an important characteristic of the Good Family Man in modern society."

BLANKENHORN'S TEMPERED AND REASONable analysis regarding fatherhood is a welcome addition to an ongoing dialogue over what it means to raise children in contemporary America. At times, however, *Fatherless America* so heavily equates masculine identity with paternity that Blankenhorn seems incapable of imagining a well-adjusted (by his standards) male who chooses not to have children—or who is not heterosexual. When a male child successfully individuates from his mother, Blankenhorn writes, "the boy becomes more than the son of his mother, or even the son of his parents. He becomes the son of his father. Later, when the boy becomes a man, he will reunite with the world of women, the world of his mother, through his spouse and children."

But such blanket statements go begging for support—and are untenable on their face. There is no social problem, urgent or otherwise, associated with childless men. *Fatherless America* points out quite clearly that the problems are with men who choose to have children and then opt out of the attendant responsibilities.

On a more structural level, even though it makes some reference to 19th- and early 20th-century sources, *Fatherless America* disappoints because it doesn't link recent theoretical attacks on the value of specifically male parenting to a longstanding siege on the family and parental authority in general. Blankenhorn, not without cause, notes that much of the scorn heaped on traditional paternal roles originates in academic scholarship of the past two decades.

Academics and other members of the cultural "elite," he says, vilify the '50s as a particularly repressive time, laying much of the blame at the feet of dear old dad: "In much of our current cultural discourse...the 1950s are portrayed as a paternal wasteland: workaholic commuter Dads in gray flannel suits; violence-prone tyrants who lorded it over women and children; materialists who thought fatherhood meant paying the bills; and cold, emotionally remote Old Fathers who wounded their children through distance."

Blankenhorn, who in no way calls for some simple-minded return to a nostalgic '50s America, counters by noting that most fathers during the "quiet decade" actually spent more time with their children than their own fathers had with them—

and more than their sons, "living in a divorce culture, would later spend with *their* children."

TRUE ENOUGH, BUT SUCH A CULTURAL etiology is too limited, and readers may want to turn to books such as Christopher Lasch's *Haven in a Heartless World* and E. Fuller Torrey's *Freudian Fraud* for a fuller diagnosis of how "elites" have systematically attacked and undermined the family for most of this century. It's worth remembering that during the late '40s and '50s themselves, much anxiety over parenting focused on "momism," a perceived inordinate increase in the mother's authority and a corresponding decrease in—and feminization of—the father's role. "Megaloid momworship has got completely out of hand," wrote Philip Wylie in the best-selling screed *Generation of Vipers*. "Our land, subjectively mapped, would have more silver cords and apron strings crisscrossing it than railroads and telephone wires. Mom is everywhere and everything and damned near everybody, and from her depends all the rest of the U.S."

The critics of momism employed a kind of vulgar Freudianism that placed the blame for juvenile delinquency, maladapted children, and all manner of social pathologies on shrewish, powerful, overprotective mothers (momism is the lurking motive for James Dean's behavior in *Rebel Without a Cause*). For the most part, however, they did this not to rehabilitate the father's familial role but to undermine parental authority in general. For instance, Margaret Mead, quoted approvingly by Blankenhorn at various points, was a leading critic of momism not because she felt an affinity for patriarchy but because, as she had put it years earlier in *Coming of Age in Samoa*, she wanted to mitigate "the strong role which parents play in children's lives."

On an even greater scale, if the 20th century has been marked by a consistent encroachment of the state into areas previously outside its dominion, much of the territorial gain has come at the expense of the family. Most of this century's most powerful political and intellectual movements—such as communism, Fabianism, fascism, Nazism, progressivism—identified the family as a source of oppression or a potential site of resistance. Hence, a shared goal was the eradication of the biological family, or at least its subjugation to particular ideological goals and aims. Although all those movements have been defeated, either on the battlefield or in the marketplace of ideas, *Fatherless America* details the degree to which the family has been seriously wounded.

Nick Gillespie is assistant editor of REASON.

Private Idahoes

By John McClaughry

Public Goods and Private Communities, by Fred Foldvary, Fairfax, VA: The Locke Institute, 212 pages, $47.96

Privatopia: Homeowner Associations and the Rise of Residential Private Government, by Evan McKenzie, New Haven: Yale University Press, 197 pages, $30.00

Neighborhood Politics: Residential Community Associations in American Governance, by Robert Jay Dilger, New York: New York University Press, 162 pages, $40.00

IN THE DARK MISTY YEARS AFTER THE collapse of Roman Britain, Germanic tribes migrated west to the island now known as England. They brought with them a mixed public-private system of land tenure and civic administration called voluntary feudalism. In this system, the proprietary landlord owned the land and organized the defense of the settlement. The freemen owned their farms and homes on a leasehold basis, paying the proprietor in produce, labor, and military service. In the ninth century, this system gave way to predatory political states, ending with the Norman Conquest and autocratic rule.

But the operative principle of voluntary feudalism survives and flourishes in various forms today, most commonly as residential community associations (RCAs). As of 1990, there were 130,000 RCAs operating in the United States, with over 30 million residents. The Community Associations Institute projects that more than 50 percent of all housing for sale in the nation's 50 largest urban areas—and nearly all new residential development in California, Florida, Texas, New York, and suburban Washington, D.C.—is organized in RCAs. By the year 2000, the number of associations is expected to climb to 225,000. If the new ones average the same number of residents as the old ones, over 50 million people, almost one-fifth of the U.S. population, will live in an RCA of one sort or another.

The rise of the RCA can be attributed to a large number of reasons, some of them springing from natural human preferences, and some of them the result of government action. The origin of the modern RCA can be dated to 1743, when the descendants of the Earl of Leicester tried to preserve a fenced-in private park in Leicester Square, London, by requiring those who bought or leased property around the park to pay a tax for its upkeep.

The prototype RCA in the United States appeared in 1831, at Gramercy Park in Manhattan. But a more fully developed example was Louisburg Square on Boston's elite Beacon Hill. In 1844, the landowners formed a Committee of Proprietors to preserve the common park area. Throughout the next 100 years, use and occupancy restrictions on residential

deeds, an important feature of RCAs, steadily grew in popularity, often as a technique of preventing a feared reduction in property values from an influx of "Negroes, Irish, Mongolians," and other non-WASP racial and ethnic groups. The use of deed restrictions for such nefarious purposes was struck down by the Supreme Court in 1948.

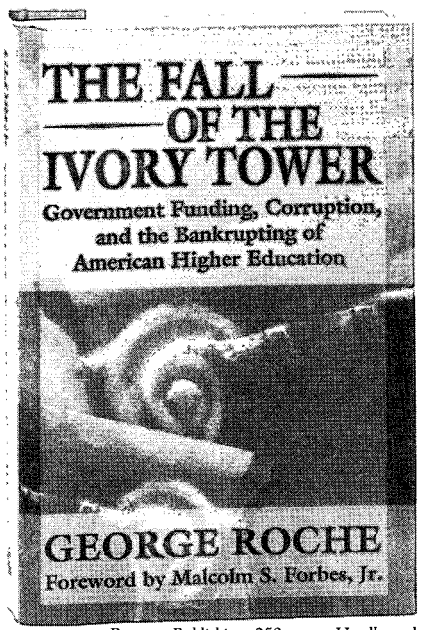
In 1902, the Englishman Ebenezer Howard published *Garden Cities of Tomorrow*, which provided the model for the self-contained suburban community of gardens, fresh air, winding streets, and happy neighbors. The man who made it happen in the United States was J.C. Nichols, the first of the great "community builders." His Country Club District development in Kansas City, begun in 1905, became the template for the modern homeowners association. By 1964, when the Country Club District was essentially completed, the development contained 6,000 acres, 12,000 homes, 11 shopping centers, 50,000 people, and 29 homeowners associations organized into a giant RCA federation.

Unlike earlier small-scale builders, who wanted nothing to do with government, Nichols perceived that government could make a large-scale community development into a very profitable venture. This required planning—not only planning by the developer, but planning by the local government for streets, water, sewers, schools, parks, and police and fire protection. It is somewhat ironic that modern land-use planning and controls came not from assorted socialists and utopians, but from hard-nosed business people whose eyes were glued to the main chance and who probably voted gladly for McKinley.

FROM A LEGAL STANDPOINT, THERE ARE three types of RCA. The most common (61 percent) is the condominium association. These are most commonly multi-family, multi-story buildings where the residents own their individual apartments plus an undivided interest in the common areas (lobby, elevators, hallways, pool, garage, etc.). These common areas are managed, but not owned, by a condominium association made up of and controlled by the individual unit owners.

The homeowners association form of RCA (35 percent) is typically found in suburban developments of detached single family homes or townhouses. The homeowners own their own dwelling unit and its yard and garage and their association, unlike a condo association, owns the common property, including streets, parks, golf courses, and retail centers.

The third form of RCA, the cooperative (4 percent), has never really caught on in the United States. In the coop, usually but not always an apartment building, residents own no property individually. They own only a long-term, renewable leasehold in their apartment, plus a divisible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GEORGE ROCHE
Foreword by Malcolm S. Forbes, Jr.

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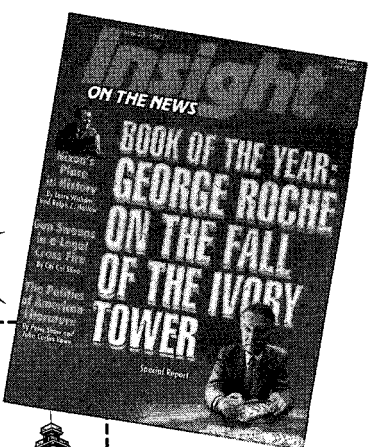

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interest in a tenant-managed corporation that owns all the common areas. The main drawback of the coop is that each cooperator is liable for all of the mortgage. If there are vacant units or if a cooperator defaults, the residents must pay their share of the corporation's liabilities.

Not included in these statistics are around 50 community land trusts (CLTs). A CLT is a democratically run RCA which owns and makes rules for dwelling on the land in conformity to a charter. Individuals can own and bequeath renewable 99-year leaseholds, and can sell the improvements made upon the land. Typically, the CLT retains a first option to buy the improvements at inflation-adjusted cost, less depreciation, so that upon sale the trust captures the increase in value due to community services or general appreciation.

The modern RCA performs four basic functions. Through a board of directors elected by the homeowners, it maintains the common areas. Like a government, it provides, either directly or through contracting, property-related services such as trash collection, snowplowing, and security patrols. It collects assessments from homeowners to pay its costs. And it enforces the covenants, conditions, and restrictions (CC&Rs) which protect the community and its property values against anti-social acts (any act which might diminish resale values). An unspoken fifth function is to organize political action efforts to get the municipal government to respond to the RCA's interests, making the RCA into a sometimes formidable special-interest group.

GOVERNMENT PROVIDED MUCH OF THE IMpetus for the growth of RCAs. Although Nichols's Kansas City project antedated extensive government land-use controls, the rise of those controls created an important and costly barrier to land development. Developers found it easier and cheaper, per unit, to invest the time and money to secure approval for a large project than for a small one. The larger the project, of course, the more profit was expected, making possible larger contributions to supportive politicians.

In response to the building industry's pleas, the Federal Housing Administration in 1963 became an aggressive booster of RCAs. For FHA bureaucrats, planned and controlled RCAs made it easy to predict the economic viability, and thus the insurability, of a development 20 or 30 years down the road. It was also easier to impress Congress by "running up the numbers" when the developers built and sold 1,000 homes at a crack. The larger the project, the more interested members of Congress were in seeing that it got FHA approval.

If everyone must remain, suffer, and sometimes perish in over-governed but under-served disaster areas in the name of civic altruism, then the residential community association is a cowardly escape.

From the standpoint of local government, at least initially, RCAs offered a terrific deal. A private developer would build needed new housing, which would add to the tax base. In return for receiving permission to exist, the RCA would provide many of its own municipal services at the homeowners' expense, thus protecting the municipality from additional costs. In some jurisdictions local governments even offer a property tax rebate to RCA members to offset their RCA assessments for services provided elsewhere by the municipality.

To prospective home buyers, RCAs promise certainty in a world of unforeseeable change, especially in protecting the homeowner's investment against depreciation. They promise a high quality of life, where sound planning and attractive amenities respond to the home buyer's desires. They offer resident control of many "public" services—a touchy point to critics—instead of leaving the homeowner at the mercy of the larger municipality, which may be controlled politically by people from the other side of town. They offer a social life in a relatively homogeneous community, an opportunity for town-meeting–style democracy, and a strong sense of personal efficacy.

Indeed, the success of RCA-type experiments as diverse as Arden, Delaware, Ft. Ellsworth Condominiums and Reston, Virginia, and the private city streets of St. Louis prove to public-choice economist Fred Foldvary that it is feasible, as well as infinitely desirable, to organize the proprietary delivery of "public" services on a territorial basis. Drawing on the work of Spencer Heath and his grandson, Spencer Heath MacCallum, Foldvary's *Public Goods and Private Communities* offers the proprietary community as the model for a happy future: All services performed in support of property by governments can be delivered far better through the use of contract, covenants, and user fees than by politicized government bureaucracies. He appears to endorse MacCallum's dream of a network of proprietary communities united into a polycentric federation that simply pushes aside traditional units of government, becoming, in effect, local government.

THE CRITICS OF THE RCA, HOWEVER, ARE many and varied, and Evan McKenzie, a lawyer and associate professor of political science at Pennsylvania's Albright College, has earned a place in their vanguard with *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. His case against these "privatopias" goes like this: RCAs are based on an "ideology of hostile privatism," where the supreme goal is the protection of property values, to which all of the nobler aspects of human life are subordinated. RCAs glorify a "culture that links ownership of private property with freedom, individuality, and autonomy, rather than with responsibility to the surrounding community." McKenzie even calls RCAs "socialism by contract"—although he concedes that it is a defective socialism since RCA bylaws don't require others to lift up the downtrodden who, due

to economic reverses, can no longer cover their RCA assessments.

McKenzie attacks the RCA—which he calls a common interest development (CID)—for exhibiting a "communalistic, even cult-like isolationist nature." He is offended that in a poll of residents at the giant Leisure World RCA in Southern California, 92 percent of the respondents rated security "very important," and were happy to have the development patrolled by 300 private security officers.

He even sees the CID as a corporatization of the home. The individual in a CID, he says, is subservient to a corporation and its detached, expert managers who carry out their functions in a way that makes life easier for them, not the residents. The CID idea, he says, begins with a plan, then property, then rules to protect the property, then a physical city, and then people who live in the city and obey the rules, or else.

"In short," writes McKenzie, "a CID is a prefabricated framework for civil society in search of a population. The population may come and go, but the property and the rules will remain, and the population will remain in service to the rules." CIDs undermine the "real city," charges McKenzie. They are illiberal and antidemocratic, and they represent, to borrow Robert Reich's phrase, "the secession of the successful" from the disaster areas they left behind.

IF CID LIVING IS AS ONEROUS AS MCKENZIE claims, it's a wonder anybody actually lives in them. But McKenzie is at pains to demonstrate that CIDs are not the product of a voluntary Lockean contract among people who wish to escape the state of nature in return for common benefits. Instead, he says, the associations are a compulsory residential nightmare. His wrath is heightened by horror stories about tyrannical enforcement of CC&Rs: a woman taken to court because her dog weighed more than 30 pounds; a man who sued his senior-citizen community because it disallowed residence by his new 45-year-old wife; and a man sued by his RCA because he erected a fence to keep his young son from wandering over a 400-foot cliff. He describes how RCAs rely upon state government to bolster their enforcement and collection powers, while at the same time bidding government to remain outside the gates.

McKenzie builds much of his attack on the highly dubious proposition that the residents did not consent to this oppressive private government. According to him, they found themselves living in CIDs because they had no realistic options for living anywhere else. This will probably come as a surprise to CID residents, who thought they chose CID ownership of their own free will, and to non-residents who must wonder how they came to be spared.

At times, McKenzie grants that residents were not forced to join CIDs against

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their will. But that merely means they *chose* to join, in which case McKenzie views them as small-minded, selfish, illiberal, greedy dropouts from the great duty of life—namely, to make municipal government work and to struggle bravely toward economic justice for all instead of feathering their own nest.

FOLDVARY'S SHINING RCA VISION IS A polycentric world of proprietary communities, wisely and efficiently operated with the consent of the residents by disinterested princes akin to Swiss hotel managers. McKenzie's horrible CID nightmare is an equally polycentric world of walled and guarded enclaves of the rich, petty, and socially irresponsible, where every generous impulse and mark of individuality is confined by a CC&R designed to advance the single-minded goal of property value protection and enhancement. Between these two poles lies Robert Jay Dilger's *Neighborhood Politics*.

Dilger, a political scientist at West Virginia University, is not seeking to grind an axe. His goal is to illuminate the origins, principles, development, and policy questions relating to the RCA movement. He blends exhaustive knowledge of his subject with an exemplary clarity of presentation. Without rhetorical flourishes or involved economic and legal analysis, he makes clear the various cases for and against RCAs. His conclusions are generally favorable to RCAs, and his recommendations include offering better information to prospective buyers to avoid ugly surprises later on, achieving better relations with local government, and providing representation for renters. He is supportive of the RCA as a channel for political activity, and as a forum for the practice of civic virtue.

RCAs obviously meet an important need for millions of people. In a society where government all too often proves unable to defend public order, assure personal security, prevent destruction of property values, spend tax dollars wisely, deliver high-quality services, and refrain from misguided social engineering, RCAs offer an attractive alternative. If one believes it is everyone's solemn duty to remain, suffer, and sometimes perish in the midst of over-governed but under-served urban disaster areas in the name of civic altruism and economic justice, then the RCA is a cowardly escape. On the other hand, if one believes in using one's resources to acquire the ownership of a decent home for one's family, or for one's retirement years, in safe and congenial surroundings, even at the price of some intrusive regulation of private choices, then the various forms of planned communities will remain an attractive option. Whether governments will allow themselves to be replaced by a RCA federation remains to be seen, but it's far from the worst idea to come down the pike.

Contributing Editor John McClaughry is president of the Ethan Allen Institute in Concord, Vermont.

Crime-Stoppers' Textbooks

By Morgan O. Reynolds

Crime, edited by James Q. Wilson and Joan Petersilia, San Francisco: Institute for Contemporary Studies Press, 631 pages, $69.95/$39.95 paper

Criminal Justice?: The Legal System Versus Individual Responsibility, edited by Robert James Bidinotto, Irvington-on-Hudson, New York: Foundation for Economic Education, 304 pages, $29.95/$19.95 paper

To Protect and To Serve: The LAPD's Century of War in the City of Dreams, by Joe Domanick, New York: Pocket Books, 497 pages, $23.00

INTELLECTUALS ONCE SCOFFED AT THE popular media for their intense coverage of crime stories. But now small forests fall as our best and brightest, not to mention nearly everybody else, weigh in on the hottest issue of our times. In a way, the entire phenomenon is amazing. So many voices, so many theories, so many studies, so much data, so many fads and fashions. And so much tax money being spent.

Predatory crime has not been a huge problem throughout most of human history. Why? As the late *Bell Curve* coauthor Richard Herrnstein writes in the collection *Crime*, "Most serious crimes are activities that no human society has ever tolerated." Every society has recognized that predation and predators must be suppressed, often ruthlessly, if peaceful social cooperation, nay civilization, is to proceed. There was guilt-free repression of criminals, regardless of race, color, or creed. And these societies didn't rely on mountains of social science research or massive federal programs to solve their crime problems tolerably well, either.

Perhaps a superior way to express it is that a moral consensus held: an unchallenged belief that each man is a free moral agent who knows the difference between right and wrong. A criminal, then, freely and viciously chooses evil, trampling the lives and property of others. To be sure, crime is human behavior and therefore complex. But the key issue is whether individuals choose or are merely corks in the ocean.

The two edited volumes—*Crime* and *Criminal Justice?*—make important contributions and each deserves its acclaim. But despite a similarity of origin and intent, they could hardly be more different. *Crime*, edited by James Q. Wilson and Joan Petersilia, is 600-plus pages of the latest scholarship on crime by 28 leading academic experts. Encyclopedic in range, it will stand as a reference source for years. Its principal defect lies in its values-neutral approach.

Criminal Justice?, edited by Robert James Bidinotto, relies on a morally com-

mitted approach to crime. Bidinotto, a *Reader's Digest* writer whose story on Willie Horton sparked a presidential campaign furor in 1988, has assembled 18 articles from 15 writers, including four essays of his own, and they read like the work of a single mind. (In the interest of full disclosure, I must note that Bidinotto includes a 1984 essay of mine from *The Freeman*.)

The Wilson-Petersilia book repeatedly clashes with Bidinotto over issues of free will and crime prevention. Wilson and Petersilia, for example, claim that understanding crime is tantamount to unlocking some of the "deepest mysteries of human nature and the greatest complexities of human society." Social science, they say, has made a start on this great voyage but has a "very long way to go." They caution that it is a great mistake "to assume that we already know what the problem is and how to solve it," and they call for more research and more policy based on that research.

The social science researchers featured in *Crime* repeatedly avoid the word *choice*. Instead, they favor "precursors," "influences," and "correlates" with crime. Not surprisingly, we learn that troubles and social pathologies are correlated, although the associations are loose. Herrnstein, for instance, ultimately admits that the real cause of crime is "people for whom the positive side of the ledger sufficiently outweighs the negative side and who have the opportunity for breaking the law." Yet he spends much of his survey pointing out that, "Most individuals with the early precursors of criminal behavior do not become serious offenders, but most (albeit not all) serious offenders have shown the precursors earlier in life.... [T]he pattern suggests that we do not know all the precursors." Such results almost beg to be interpreted as choice.

In this non-judgmental vein, Herrnstein takes up the case of Arthur Shawcross, the serial killer who murdered 11 women in the late 1980s in and around Rochester, New York, while on parole after serving 15 years for killing two children. Herrnstein reads off Shawcross's traits—lifelong antisocial behavior, XYY chromosome, below-average verbal IQ, and so on—and observes that the person who "suffered" this improbable "collection of risks" developed into an offender of such "dangerousness" is not mystifying. *Suffered? Risks?* It all sounds like a contagious disease, involuntary compulsions, free of moral choices. But we can always find people of similar description who made less vicious choices. As well-known criminologist Stanton Samenow remarks in *Criminal Justice?*, "Psychology always has a clever theory about any bit of behavior and offers an explanation, but only *after the fact*."

JAMES Q. WILSON, AUTHOR OF *THE MORAL SENSE* and the man proclaimed the best social scientist in America by *Wall Street Journal* columnist Paul Gigot, begs to differ with Samenow. In *Crime*, Wilson declares, "Much of our uniquely American crime problem...arises, not from the failings of individuals, but from the concentrations of people at risk for failing in disorderly neighborhoods." His prevention measures would include "wide-ranging and fundamental changes" in the life circumstances of "children most at risk," including relocations of households into neighborhoods with "intact social structures," group homes for welfare mothers, and boarding schools for children. This is scary stuff, especially coming from a man who admits that he doesn't know if any of it would work.

Indeed, the Wilson-Petersilia volume demonstrates blind spots even on its own "neutral" grounds. James Lynch's article on international comparisons, for example, points out that the risk of lethal violence is "much higher in the United States than in other nations, even those most institutionally similar." Yet this approach overlooks a more-imaginative comparison of the northern border states most similar to Canada in their demographic makeup. By this test, U.S. homicide and other crime rates are no higher than in our much-celebrated neighbor to the north.

But the book's main flaw remains its

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utilitarianism and determinism. Travis Hirschi, a prominent University of Arizona criminology professor, is the only writer in *Crime* to mention morality, though in a convoluted way: "Crime and immorality have the same causes and consequences and are thus the same thing. They are the same thing from other perspectives as well." Hirschi also hints at free will in his statement, "Most children turn out okay whatever their family circumstances."

Grandma (weep) wouldn't bake me chocolate chip cookies when I was a child.. That's why I shotgunned her and Gramps and stole their retirement..
We (sob) find the defendant, not guilty.
Mike Luckovich
ATLANTA CONSTITUTION

Just about every crime issue is covered in the Wilson-Petersilia book—inner city schools, informal community controls, police deployment, wars on guns and drugs—in a sophisticated but ultimately unsatisfying way. While information is nice, other societies have demonstrated repeatedly that social science research is neither necessary nor sufficient for low crime rates. Crime control is mostly a moral issue, combined with the will to follow through. In a strange way, our social scientists resemble criminals in their flight from morality. The policy recommendations are uninspired, lack conviction, and are soft on criminals.

Wilson closes the book with a scare scenario: There will be 1 million more 14- to 17-year-olds—roughly half of them boys—in the year 2000 than today. Since the top 6 percent of males commit a majority of serious youth crime, it promises to get worse. "Get ready," Wilson says, although he doesn't say how. Two thoughts occur: Does he mean arm yourself? That's doubtful. And 30,000 more vicious punks? If we can't handle them, then we aren't prepared to handle much of anything.

IN A MARKED CONTRAST TO *CRIME*, Bidinotto's *Criminal Justice?* draws a tight bead on the helpless individual theory. "The ordinary citizen believes individuals are responsible for what they do," writes Bidinotto, "and thus should be held accountable for harm they do to others." By contrast, he says, the academic and legal communities start with the premise that the individual criminal has little personal responsibility because he is "shaped by a wide variety of forces—biological, psychological, or social—over which he has little volitional control."

The Wilson-Petersilia book never states it that clearly but hardly refutes the characterization. Bidinotto believes that the public is right and the experts—whom he calls the Excuse-Making Industry—wrong, although the experts have acquired the power to ruin the criminal justice system, twisting its purpose from the punishment of wrongdoers to their treatment and rehabilitation.

Bidinotto claims that the fundamental error of the social science establishment stems from its embrace of the philosophical doctrine of determinism, the idea that there is only one possible action for an individual at each moment, the net result of all the causes operating up to that moment. He tags it a "billiard ball" theory of human action. Free will or volition, by contrast, supposedly sounds "causeless" and therefore unscientific. In truth, organisms are purposeful. They are goal-directed. Humans have the additional capacity to think and direct their awareness. Acting in accord with our nature as reasoning organisms, we initiate actions in pursuit of our purposes and therefore we are causes, not just effects. To treat criminals as if they don't act purposefully, continually accepting or rejecting courses of action, implicitly ignores their humanity, and therefore the source of their criminality. This is a scientific approach to human behavior and, rather than violating the law of causality, it accurately diagnoses the nature of things.

In his contribution to *Criminal Justice?*, philosopher David Kelley characterizes criminals as individuals with "a gross deficiency in what used to be called the moral faculties" and as "profoundly amoral." The psychopath is "a prototype to which criminals conform more or less closely."

Kelley argues that the same conflict between free will and determinism arose in philosophy but that the trail of "scientific inquiry keeps circling back" to our capacity for conceptual thought and choice. The old assumption that science is a witness against free will turns out to be false. Human beings turn out to be far more complicated than determinists believe, and that explains why the correlates with criminality are so loose and will always be so.

BIDINOTTO CLAIMS THAT THE DEADENED conscience of criminals has been encouraged by the moral relativism of the 1960s, as well as the continuing erosion of the moral landscape courtesy of the Excuse-Making Industry. Within the corrections industry, the practical consequences are that discipline has been relaxed and punishment largely banished: The likelihood of speedy release shapes the whole environment. Inmates pretend to reform themselves, and their keepers pretend to believe them. Community-based corrections continue the fiasco.

Stanton Samenow, who has interviewed thousands of criminals, insists, "The criminal is rational, calculating, and deliberate in his actions. Criminals know right from wrong....A habit is not a compulsion. On any occasion, the thief can refrain from stealing if he is in danger of getting caught."

Samenow's findings lead to his critique of his scientific rivals: "Sociological explanations for crime, plausible as

MIKE LUCKOVICH

they may seem, are simplistic. If they were correct, we'd have far more criminals than we do....Criminals claim that they were rejected by parents, neighbors, schools, and employers, but rarely does a criminal say why he was rejected.... [Criminals] *chose* the companions they liked and admired....Far from being a formless lump of clay, the criminal shapes others more than they do him....[W]e must see the criminal as the problem, not society." John DiIulio and Charles Logan add, "Punishment is an affirmation of the autonomy, responsibility, and dignity of the individual."

The Bidinotto volume has a respectable showing of statistics, but its strength remains its wisdom. Judge Ralph Adam Fine may offer the most penetrating line in the book: "We keep our hands out of a flame because it hurt the very first time (not the second, fifth, or tenth time) we touched the fire."

In terms of specific public policies, *Criminal Justice?* recommends various changes in the rules of the game, such as a ban on plea bargaining; a ban on psychiatric testimony on the "state of mind" of the accused at the time of the crime; replacement of the Miranda and search-and-seizure exclusionary rules; repeal of the legal insanity defense; capital punishment as the standard penalty for premeditated murder; repeal of drug laws; greater use of private incentives and contractors to administer criminal justice; more work for prisoners; more prison space; truth-in-sentencing for violent criminals (serve 85 percent or more of sentences); juvenile records available for adult sentencing; restitution actually enforced; and parolees supervised intensely by armed officers. Bidinotto admits that as long as men (and over 90 percent of criminals are male) have the power to choose evil, crime will exist. Yet it can be kept low if the justice system treats them as fully responsible for the harm they do.

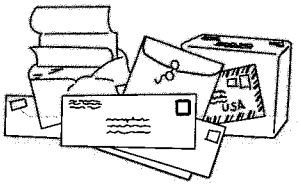
To Protect and To Serve is about the cops, not the robbers—but given that its subject is the Los Angeles Police Department, the disparity in author Joe Domanick's mind may not be so great. Domanick has as much admiration for the LAPD and its chieftains as the O.J. Simpson defense team does. He grinds out a relentless and fascinating 400-page indictment of the LAPD: Since World War II, it has been brutal, disrespectful, and unaccountable. The Rodney King beating and the subsequent "insurrection" in South Central Los Angeles were inevitable, Domanick argues.

Despite his tendency to fall into boilerplate leftism and egregious obscenities, Domanick draws up a surprisingly good case for his indictment. Once the most admired department in the country, the Sgt. Joe Fridays of L.A. robocop efficiency are now demoralized roboscrap. It's a colorful story well told, filled with rogues, and energized by a Lord Acton–like moral: An autonomous, paramilitary bureaucracy must absolutely run amuck. Despite my general admiration for the police, this is a plausible conclusion to a public-choice economist.

Some of the political reforms recently imposed on the LAPD actually make sense—such as an independent board and a police chief with limited terms and vulnerability to dismissal—though Domanick doubts their efficacy. He has no real reform ideas because he spends most of his energy emoting on behalf of the downtrodden. Real reform of the police would begin with Judge Fine's dictum that, "A finely tuned criminal justice system will punish the guilty and leave the innocent unmolested." Following this philosophy requires adjusting incentives to make the personal interest of the police coincide with that social interest.

Just as with misfires in other big city police forces, the LAPD leadership gave cops the wrong incentives—namely, to be aggressive full-time on the street and to focus on the number of arrests as a sign of productivity. Yet the real aim is reduction in crime, which often calls for a soft touch. Rather than garnering blind praise for increased arrest rates, police departments should be financially rewarded for verified reductions in crime, not arrests per se.

And, like all governmental bureaucra-



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cies, the police need to be decentralized and made accountable to the people they are supposed to protect. Neighborhoods that hire their own security forces tend to expect and get action when they report crimes, which increases their sense of ownership and community and helps to further reduce crime. Such incentive-based reforms of the criminal-justice system—with their attendant benefits accruing to the non-criminal population—unfortunately receive too little attention in these books.

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Antitrust Busters

By David R. Henderson

The Causes and Consequences of Antitrust: The Public Choice Perspective, edited by Fred S. McChesney and William F. Shughart II, Chicago: University of Chicago Press, 379 pages, $66.00/$32.95 paper

THIRTY YEARS AGO, ECONOMISTS BEgan to analyze carefully the effects of government regulation and found, almost without exception, that such regulation reduced competition and raised prices. Whether in surface transportation, airline seats, milk, or cab rides, the story was the same. One big exception was natural gas, where a too-low federal price ceiling created a serious shortage instead.

It was only natural that curious economists would widen the net to look at the effects of antitrust regulation. Beginning in the early 1970s, economists studying antitrust found that it often created monopoly by preventing companies from pricing too low or expanding too much. Antitrust authorities, they found, often were more interested in preserving competitors than in preserving competition.

Economists also found that regulated industries often lobbied for the anti-competitive regulation in the first place. Consumers never asked for an Interstate Commerce Commission to prevent new truckers from entering the business. Nor had consumers been heard from when the federal government set up milk marketing boards to restrict the supply of milk and drive up the price. The main players were truckers and milk producers, who wanted to limit competition. Quite naturally, then, some curious economists began to wonder how we ended up with antitrust laws.

Fred S. McChesney, a law and economics professor at Emory University, and William F. Shughart II, an economics professor at the University of Mississippi, were two pioneers in antitrust research. This book brings together, in one place, evidence of the harm done by antitrust and of the special interest lobbying that led to its adoption and that guides the antitrust agencies' policies. The book is a major step towards correcting a deficiency in economists' and the public's understanding of antitrust.

Part One presents evidence by various researchers that is inconsistent with the standard public interest view of antitrust. Part One's most striking article is Paul Rubin's "What Do Economists Think of Antitrust?: A Random Walk Down Pennsylvania Avenue." Rubin uses a simple but marvelously clever methodology. He takes all the antitrust articles cited in a major industrial organization textbook by Frederic M. Scherer and David Ross. Rubin notes that Scherer is a leading proponent of antitrust and that, therefore, any bias in the cases cited in the book would be in favor of cases where the antitrust authorities were acting to preserve or increase competition.

Rubin then summarizes each case and categorizes them, by the standards of the author writing about the case, as justified or unjustified The bottom line: In the view of the economists writing the articles, there were 14 justified cases and nine unjustified ones. Moreover, the plaintiffs won a lower percentage of the justified cases (64 percent) than of the unjustified ones (78 percent). Concludes Rubin: "Factors other than a search for efficiency must be driving antitrust policy."

THE ARTICLES IN PART TWO ASSESS antitrust's actual effects. George Bittlingmayer examines the great merger wave between 1898 and 1902, in which more than 2,500 manufacturing and mining firms disappeared through merger. Economists have long been puzzled about what caused that wave: Bittlingmayer argues it was caused by antitrust. You probably thought that antitrust enforcement *prevented* mergers. It does now, but as Bittlingmayer shows, the Sherman Antitrust Act was used to prevent companies from making loose cartel agreements. So, prevented from colluding, the firms merged.

Not that cartels necessarily hurt consumers. In line with a recent strand in economics that University of Chicago economist Lester Telser began, Bittlingmayer argues that cartels can be an efficient way of preventing ruinous competition when firms' fixed costs are very high and their variable costs are low. If you doubt that that's a problem, take a look at airline profits since deregulation. The added cost of taking another passenger is close to zero, which is why airlines get into so many price wars and are often on the verge of bankruptcy.

Another article in Part Two by two of my former students, Espen Eckbo and Peggy Wier, finds that antitrust authorities do block mergers, but that the ones they block are pro-competitive. Eckbo and Wier point out that if a merger is pro-competitive—and therefore likely to reduce profits, to the benefit of consumers—then the stock price of the once-com-

peting firms should fall when the merger is announced and rise when the government prevents it. This, they find, is what happened.

So promoting efficiency doesn't motivate the antitrust authorities to pursue cases. Part Three investigates what does. "Antitrust Pork Barrel" by Roger Faith, Donald Leavens, and Robert Tollison argues that political influence is an important determinant of actions by the Federal Trade Commission. Bottom line: If you want the FTC to hassle your competitor, move your firm to a congressional district whose member sits on a committee that controls the FTC's budget.

Promoting efficiency doesn't motivate the antitrust authorities to pursue cases. Political influence is a more important determinant of Federal Trade Commission actions.

The real dynamite in Part Three is in the opening footnote to "Bureaucracy and Politics in FTC Merger Challenges" by Malcolm Coate, Richard Higgins, and McChesney. The footnote states: "We have reluctantly agreed to recite the following, written by the FTC's Office of General Counsel:" and then goes on to quote a statement that the FTC disagrees with the article's method and conclusions. Although McChesney doesn't write this in the book, he told me that the FTC's general counsel threatened to bring criminal charges against him if he "published" (the legal term for making public, which would include sending off the manuscript to a journal) his results. The FTC claimed McChesney was using confidential data but cast doubt on its own statement by agreeing to allow publication with the disclaimer.

The article shows that congressional pressure does affect the FTC's decisions to challenge mergers, something that even a casual observer of the Washington scene will have noticed, but a conclusion for which little econometric evidence had ever been presented. They show that one additional congressional hearing raises the probability of a merger challenge by 4.2 percentage points. Moreover, by separating out the effect of the FTC's lawyers' and economists' recommendations to the commission, the authors show that the political influence occurs at the commissioner level, not below. No wonder the FTC was upset.

If the Sherman Act and Clayton Act didn't address a pressing public interest, why were they passed? Part Four addresses that issue. In "Antitrust Before the Sherman Act," Donald Boudreaux, Thomas DiLorenzo, and Steven Parker write that the major groups that lobbied for a Missouri antitrust law in the 1880s—a precursor to the federal Sherman Act—were rural cattlemen and butchers who wanted to "thwart competition from the newly centralized meat-processing facilities in Chicago." They find that between 1880 and 1890, Missouri beef prices fell by 13 percent and cattle output rose by 50 percent. Although the price fall by itself is consistent with the idea that the central meat-processing facilities were a monopoly buyer of beef, the increase in output is evidence against. Disappointingly absent from the book is DiLorenzo's earlier article in which he demonstrated that most of the industries supposedly monopolized by the trusts—bituminous coal, lead, leather, linseed oil, liquor, petroleum, salt, sugar, and steel—had falling prices and rising output in the decade before the Sherman Act.

Also disappointingly absent is Bittlingmayer's article sketching out the connection between increased antitrust enforcement and the 1929 stock market crash. The reader is left hungering for more when he reads, in a related Bittlingmayer article, the following: "Hoover's new approach [on antitrust], which was quickly backed up with stricter enforcement, ex-

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plains the crash...." When someone dismisses almost everyone's beliefs about the causes of one of the most important events of the century, most readers, including this one, want to see some evidence. When the cause is said to be antitrust, you would think that a book trying to wage a war against antitrust would contain that evidence.

I have always wondered why a profession that is skeptical of airline regulation and trucking regulation has been so unskeptical about antitrust regulation. One reason may be that economists do a large fraction of their consulting for antitrust plaintiffs and defendants.

A second possible reason economists have not been skeptical about antitrust is that few of the economists who have researched or read about the individual trees in the antitrust forest have been aware of how strong a case there really is against antitrust. *The Causes and Consequences of Antitrust* will do much to remedy that defect.

Contributing Editor David R. Henderson is an associate professor of economics at the Naval Postgraduate School in Monterey, California, and an adjunct fellow with the Hoover Institution. He is editor of The Fortune Encyclopedia of Economics.

Michael Lind: His proposed new nationalism would diminish the American nation if embraced.

National Velcro

By Michael Barone

The Next American Nation, by Michael Lind, New York: The Free Press, 415 pages, $22.95

MICHAEL LIND IS A YOUNG MAN full of learning, information, humor—and himself. Formerly an editor at the neoconservative *National Interest*, later with *Harper's* and *The New Republic*, he attracted attention earlier this year for articles in the *New York Review of Books* attacking Pat Robertson. Now he comes forward with *The Next American Nation*, very much a young man's book, full of brilliant analysis and surprisingly effective bombast—and, alas, some crackpot solutions. I think Lind is on the right track in searching for a usable, tolerant American nationalism that can help knit together our Tocquevillian post–Cold War America. But his solutions leave me with the feeling that the search must go on.

One problem has its roots in Lind's periodization. Like political scientist Stephen Skowronek in *The Politics Presidents Make* and constitutional scholar Bruce Ackerman in *We the People*, Lind divides American history into periods. Like them, he locates one break at the Civil War and Reconstruction; unlike them, he locates the next not at the New Deal but in the civil rights revolution of the 1960s. This is essential to his characterization of America's three "Republics": The first was Anglo-American and Protestant, the second was Euro-American (i.e. with lots of immigrants) and Judeo-Christian, and the third is Multicultural. He is appropriately scornful of the affirmative action thinking which depicts America as a nation of five separate races ("Asian and Pacific Islander" is one) and notes that the Third Republic is "associated with declining living standards, polarized politics, and foreign policy failures."

That's more than a little overwrought: It's not as clear as Lind thinks that living standards are declining; party politics are always to some extent polarized; and amid foreign policy failures we did manage to win the Cold War.

My greater problem with Lind's formulation, however, is that he makes multiculturalism too central to American life. Affirmative action bureaucrats may classify by race, college and corporation bureaucrats may classify by race, and college and corporate vice presidents may join affirmative action bureaucrats in congratulating themselves on achieving the right numbers—Lind admirably describes these scams.

But do most Americans really swallow the multicultural line? We do live in a segmented society, but in segments largely determined by personal choice, maintained by voluntary action, and penetrable by just about anyone who wants in. (Lind has made his living in neoconservative, leftish, and neoliberal segments already.) Lind argues sensibly that affirmative action should mostly be junked; ingeniously, he suggests the Census Bureau should stop counting by race. But my impression is that the whole rotten structure of racial quotas is going to tumble down rapidly, given the speed with which the California Civil Rights Initiative has injected the issue into the political process. Affirmative action will die because it never had a strong place in Americans' hearts.

IF LIND IS AN ACUTE ANALYST OF AFFIRMATIVE action, I am afraid he has got it all wrong when he denounces the Third Republic's "overclass." His idea is that in this period of American history all power has gone uniquely to the top 20 percent of Americans: professionals and managers who manipulate the economy and both political parties to monopolize the benefits of economic growth for themselves. But there has always been a top 20 percent in American history. And the over-

class today as before has proven exceedingly permeable.

Lind cheap shots the argument by noting that George Bush was chauffeured to kindergarten in a limousine. But Bill Clinton, Bob Dole, Newt Gingrich, Ross Perot, and Colin Powell surely weren't—and the list goes on and on. Sure, a lot of people on the *Forbes* 400 inherited much of their wealth. But a lot of others on the list started off with nothing. Sometimes clever young men who break into the overclass feel guilty and therefore impelled to argue that no one deserves to be there.

Lind's preoccupation with the overclass leads to the biggest defect of *The Next American Nation*—its prescription of big government programs as the cure for the ills that ail us. To provide high-wage jobs for low-skill American workers, he wants zero net immigration and a "social tariff" penalizing companies that invest abroad; to teach people skills, he wants "single-payer education" from kindergarten to college; he wants tariff walls and national health insurance.

This is classic European welfare state circa 1960, complete with protectionism, and it has obvious problems, as a glance at Europe today suggests. It doesn't create many jobs (and even without immigration, America has a growing population and needs new jobs) and it doesn't generate much technological innovation (which America's Third Republic has done admirably). It is not suited to America's folkways—which Lind describes admirably, even eloquently.

Like Bill Clinton, Michael Lind imagines that most Americans are seething with anger and envy over the fact that some Americans are getting rich. He supposes therefore that the majority is ready to support a politician who promises to take money away from the rich and give it to everyone else. Lind advocates "unsubtle, crude, old-fashioned redistribution of wealth, through taxation and public spending."

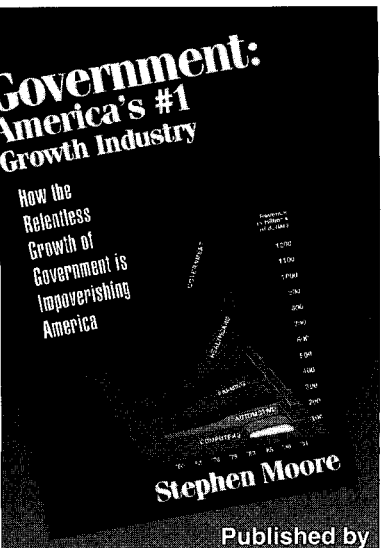
But over the past 20 years, as the income distribution has become less egalitarian, the politics of economic redistribution has become perceptibly weaker. And that's not because the overclass has prevented such a politics from emerging: Politicians from Dick Gephardt to Jesse Jackson to John Connally have preached redistribution and protectionism and haven't gotten very many votes. The American people don't want the medicine Lind is prescribing, because they don't think they have the disease he diagnoses.

Near the end of his book, Lind quotes Herbert Croly's *The Promise of American Life*, the book which, as Lamar Alexander recently pointed out, provides the basic argument for a centralized bureaucratic government to solve common problems and redress economic inequality. But Croly was 1909 and this is now. Lind should read Alexander or Jim Pinkerton, who argues persuasively that public opinion is moving to dismantle the centralized bureaucracies of Croly's Progressive era and to replace them with market mechanisms and forms of choice. The centralized stuff, of which Lind wants more, just doesn't work very well anymore.

But nationalism does, or can. Lind takes the risk of sounding foolish in describing lyrically his vision of American nationalism, and I think he carries it off very well. If we are in a segmented society, we still need something to hold us together as a nation, and Lind has done as good a job as anyone lately in describing what it is: partly a heritage of laws and political institutions, certain habits of liberty, particular folkways and styles of behavior.

There is much in common here with the nationalism of Newt Gingrich, but unfortunately Lind seems determined to damn the Republican right and all its works. The result is a set of nationalist policies unlikely to be embraced by the American people and likely to diminish the nation, economically and otherwise, if they are.

Michael Barone is a senior writer for U.S. News & World Report, *co-author of* The Almanac of American Politics, *and author of* Our Country: The Shaping of America from Roosevelt to Reagan.



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Roast Pork

By Thomas W. Hazlett

Is Social Security really still untouchable?

THERE ARE JUST TWO ESSENTIAL PUBlic-finance facts that Great Leaders of our Republic need to know:

1) Social Security is bankrupting us. While the ratio of workers to recipients was 16:1 in 1950, it has fallen to 3:1 today, and will be 2:1 by 2030. Respected economists have estimated that doing nothing to reform the system will result in newborns facing a lifetime tax rate of 84 percent. And that is not, as we say, a stable equilibrium. Even Canada starts looking like a bargain at a U.S. tax rate of 84 percent.

2) No candidate for public office anywhere in these United States dares even whisper the words, "Social Security cut." There are lots of things you can do and still be elected (use state troopers to pick up chicks, drive young women over a bridge to their death, etc.) but you had better not suggest that Social Security benefits should be, to put it boldly, "reexamined."

Even the Revolutionary Republicans of '94 wimped out. You've heard about the Contract with America. Well, leaving Social Security alone was their Pact with the Devil. The GOP defense is that Satan has signed deals with everyone in their neighborhood. And, of course, there's history: Reagan and the Republicans were hammered for even thinking about Social Security reform in 1982...and elephants have good memories.

Is there no hope? Will budgetary realities simply be deferred until a nanosecond prior to fiscal destruction? I say there is indeed a slim chance that Washington will act in a more timely manner. Call me wacky, call me hallucinogenic. But budget policy in Congress, and much else, has become—if for one brief, shining moment—nationalized.

This stands Tip on his head. When the late former Speaker noted that "all politics is local," he was conceding that congressional politics is 100 percent pure pork. Constituents grade their local reps not by how they perform on the Great Global Issues of the Ages, but by a more modest standard: *bringing home the bacon*. Such logic is implicit in approval ratings showing that while the American public ranks Congress as an institution somewhere between Hezbollah and the Post Office, voters typically think their representative is a close second to Mother Teresa.

This dichotomy was upset in the 1994 elections—thanks, ironically, to the Democratic Party's energetic assault on the Contract with America. By de-localizing the campaign, the scaremongering backfired, just as the hysterical campaign against Proposition 13 in California had some 16 years previous: "Whenever I tell an audience that Proposition 13 will bring government to a screeching halt," said a Republican assemblyman campaigning against the measure, "all I see are smiling faces." Two-thirds of Californians gave Prop. 13 a whirl.

In the 1994 campaign, frothy Democrats succeeded in legitimizing the Republican agenda. Not only were the Dems routed in the returns, but the nature of their crazed (failed) attacks gave Speaker Gingrich the policy mandate to push through the most daring legislative package since at least the New Deal.

ALL OF WHICH CRACKS AN OPENING FOR truly fundamental budget reform. The Republicans in Congress have called Clinton's budget-deficit bluff in a way that makes us beet red for the president. After crowing most every waking hour since January 20, 1993, that he is the first American to have had the courage to deal seriously with the runaway deficit, Clinton won't even engage on the issue. As *The New Republic* recently chimed: "The president will not propose an alternative deficit-cutting plan; oh, all right, he will; on third thought, he won't....The president's strategy, it seems, is soothing farmers, scaring the elderly and generally reacting as an ally of the status quo."

As with all else, the Republicans' best weapon is Democratic incompetence. The president's floundering and disingenuousness on budget cutting creates a political opportunity for reasonableness on Social Security. At some point—just maybe—the Republicans are going to suck it up and give the Democrats ample opportunity to go nuts in response to a proposal to do the right thing: Raise Social Security retirement ages, cap cost-of-living adjustments, and give individuals the chance to opt for private retirement insurance. If the moment does not come soon, the right thing will become the only thing—with excruciating pain.

As *Time* put it in a very sobering cover story last March: "[I]n 20 years, more or less, when people now in their mid-40s begin to retire...the system will be lurching into its final crisis. For government to pay pensions to the advancing tide of baby boomers will almost certainly require stunning benefit reductions or huge tax increases....After years of fiscal and political fecklessness, an explosive conclusion."

All politics may be local, Tip, but the national bankruptcy will be quite widely shared. Perhaps then an ex-President Clinton will reemerge and boast of how his administration's policies have, with a bit of a lag, "brought America together." ◆

Contributing Editor Thomas W. Hazlett teaches economics and public policy at the University of California at Davis.

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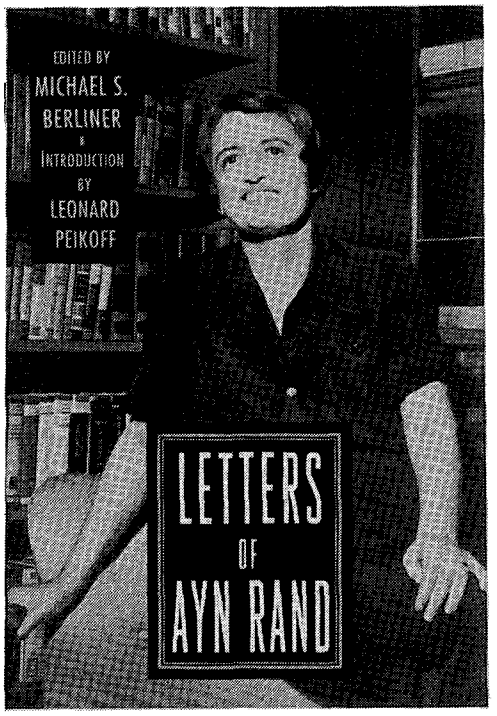

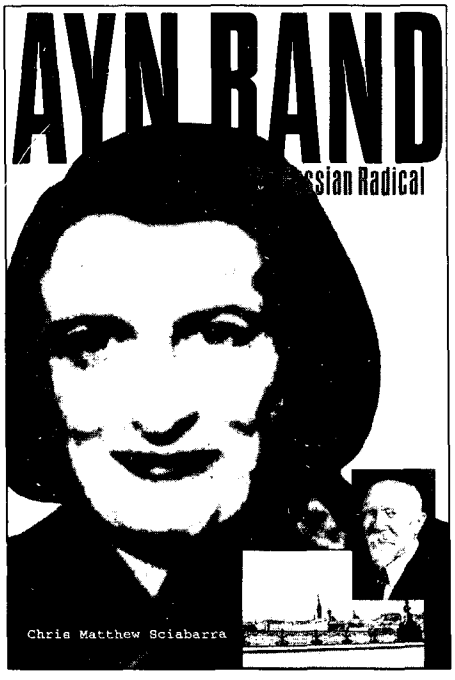

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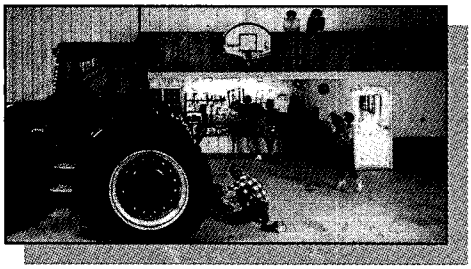

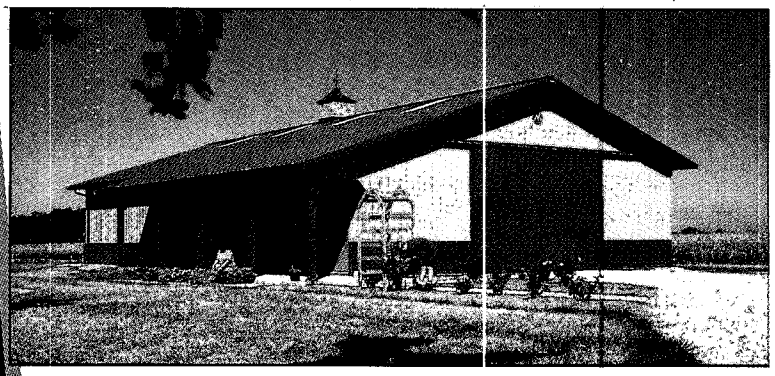

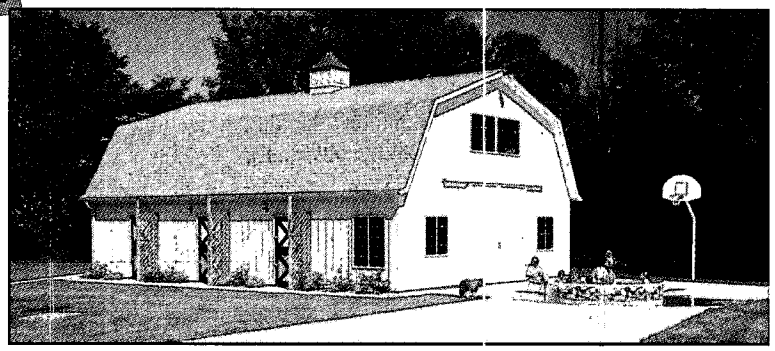

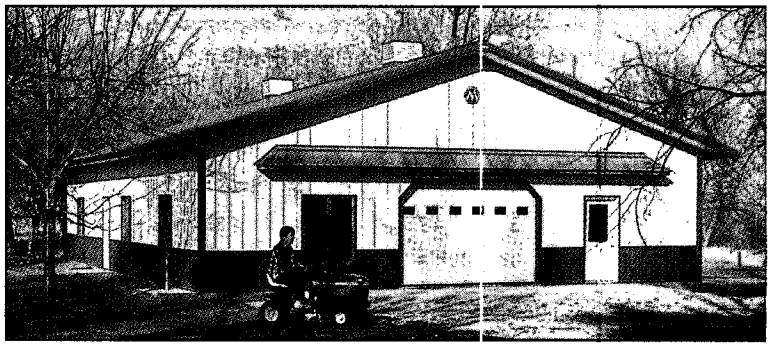

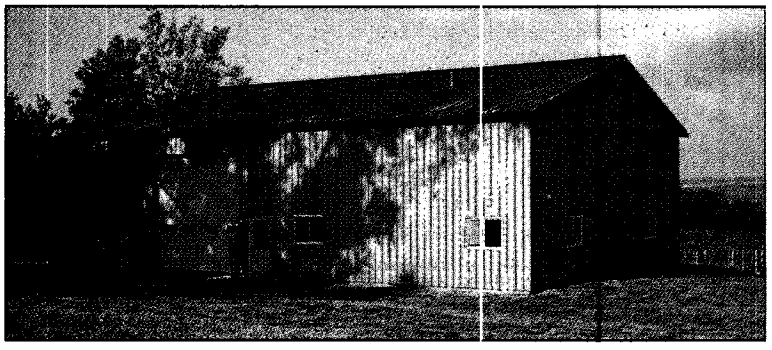

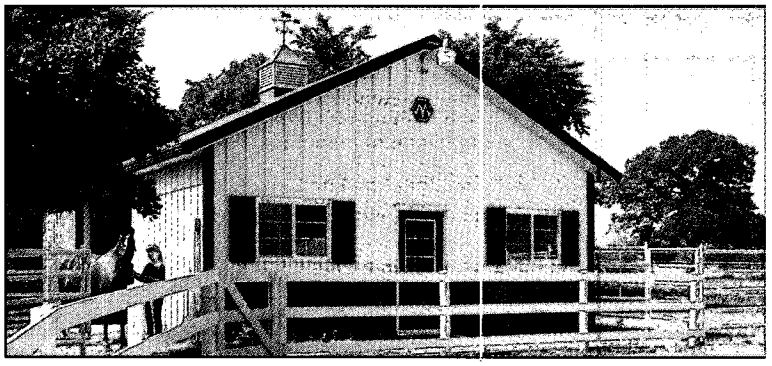

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